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THE

NATURE AND PRACTICE

OF

REAL ACTIONS,

IN THEIR

WRITS AND PROCESS,

BOTH

Original and Judicial.

BY GEORGE BOOTH, ESQ.

FIRST AMERICAN EDITION;

In which the ancient Writs and Records are correctly translated from the Latin, with the addition of references to English and American authorities, and to the statutes of the state of New-York.

BY JOHN ANTHON, ESQ.
COUNSELLOR AT LAW.

NEW-YORK:

PRINTED AND PUBLISHED BY STEPHEN GOULD,
AT THE SIGN OF LORD COKE, OPPOSITE THE CITY-HALL.

1808.

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"The Nature and Practice of Real Actions, "in their Writs and Process, both Original "and Judicial, by George Booth, Esq. First "American Edition; in which the ancient "Writs and Records are correctly translated "from the Latin, with the addition of refer- "ences to English and American authorities, "and to the statutes of the state of New-York, "by John Anthon, Esq. Counsellor at Law."

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THE

INTRODUCTION.

THOUGH Real Actions are now much worn out of use for the rocovery of lands, yet the learning concerning them is of no small advantage for the true understanding of the original cause of many points in law that do and may occur in daily practice at this day. And without some competent knowledge of this nature, it is not possible for any to be well grounded in the true reason of the common law, so as to be able to give sound advice in all cases that may happen, especially relating to titles of land and hereditaments. In the learning of these actions, especially in the learning of pleading therein, *consist in the theory and practice. In the practice is comprehended the nature of the Writ to be sued forth, the Process and Proceedings in the several actions to judgment. The theory contains the learning of Pleading in the said several actions.* That is, how to count, plead in bar, to reply, &c. *And in this* lies the marrow and reason of the law. For in such cases a man must understand the nature of titles to land, by conveyance, descent, disseisin, discontinuance, abatement, remitter, where entry is lawful, where not lawful. *I have in this treatise attempted something both as to the first and to the latter.* He that knows well how to plead

well in real actions, will know the better how to plead in many personal actions, as in actions of *trespass* and *replevin*, where the freehold comes in question. By the pleadings in a *Quod permittat*, *Secta ad molendinum*, *Curia claudenda*, *&c.* the knowledge of pleading or declaring in actions upon the case for Ways, Markets, Commons, &c. Suit to the Milne, for Non-inclosure, may be had, and to plead prescriptions in such cases. The like may be said of most or many other real actions. The learning of assises holds out fully the nature of titles of entry, whereby a man may be sufficiently instructed how to manage an *Ejectione firmæ*, which is now the common action for recovery of lands where the entry is lawful.

They are called Real Actions to distinguish them from personal actions which are grounded upon contracts, torts, &c. of men one amongst another, for which damages, or something personal is to be recovered, and these follow the person. Real Actions are such as are for the recovery of the freehold or inheritance of lands or hereditaments, and these are either purely Real or Mixt; purely Real are such as are for recovery of land only without damages (for no damages were recoverable by the common law in any Real Action) Mixt are such, as where both lands and damages are recoverable by the common law. As assise of *Novel disseisin*, Writs of Entry, Attaint, &c.

More particularly these Real Actions may be subdivided into divers kinds. 1. Into writs of Right.

2. Writs of Entry. 3. Writs of the ancestor's possession, called *Possessory Ancestral*, and all those called *Præcipe quod Reddat*. 4. Writs which contain no express demand in the writ, *i. e.* no number of acres or messuages, and begin with these words, *Si A fecerit te securum, &c.* And the *Assise* of *Novel disseisin*. These are for the recovery of lands in *demesne*.

Other Real Writs there are for recovery of hereditaments, and for performing and doing other things concerning lands and hereditaments. Of the first sort are 1. A Writ of Right Patent, &c. Right Close, this is the purest and highest Writ of Right. 2. A Writ of Right of Dower, a Writ of Right *De Rationabili parte*, a Writ of Right *Sur Disclaimer*. Writs of Right in their nature are, the Writ of *Escheat*, *Formedons*, *Quod ei deforceat*, and some others. Of the second sort are, 1. Writs of Entry in the *Per*, *Cui*, *Post*, as Writs of Entry in nature of an Assise. 2. Writs of intrusion. 3. *Cui in Vita*. 4. *Cui ante divortium*. 5. *Sur Cui in Vita*. 6. *Dum non fuit Compos mentis*. 7. *Dum fuit infra ætatem*. 8. Writs of Entry at common law. 9. *Ad terminum qui præteriit*. 10. *Causi matrimonii prælocuti*. 11. *Sine assensu capituli*. Of the third sort are where the ancestor (not being father, mother, brother, sister, uncle, aunt, nephew or niece, for of them a *Mortdancester* lies) died seised, viz. the writs of *Ayel*, 2. *Besayel*, 3 *Cousinage* Of the fourth sort are the *Nuper obiit* and *Mortdancester*.

Those for recovery of other hereditaments, and for doing and performing other things concerning lands and hereditaments are, 1. a Writ of Annuity, 2. *Quare Impedit*, 3. *Juris Utrum*, 4. *Attaint*.

IN this new edition of Booth, the Editor has translated the ancient records from the latin, and, occasionally, inserted references to English and American decisions, where it was thought they might tend to elucidate the Text.

He has also inserted references to the statutes of this State, wherever they were introductory of the same, or of different regulations from those of Great-Britain.

The Editor claims no praise for his exertions, he is conscious that his task has been humble, and will deem himself amply rewarded, if the student of this obscure branch of practice shall find his labours in any manner aided, by the present form of the work.

New-York,
April, 1808.

Teste and Return of process in the Supreme Court of the state of New-York, in Real Actions.

ORIGINAL PROCESS.

Teste.

All writs of summons and attachment, and other process in pleas of land shall have 15 days at least between the teste and return. 1 Rev. Laws, 91.

Return.

Dies in Banco or common return days in Supreme Court are	1st. Monday & 2d Tuesday in each term.	1 R. L. 315.

On the days in bank all original writs are returned. 1 Sellon, 10.

1st. Thursday—	Quarto die post of the 1st return.	S. Court. 1803.
2d. Friday—	Quarto die post of the 2d. return.	

Mesne process in Real Actions.

All writs of summons to warranty, and all other process in Real Actions being tested the last day or any other day in any term, and returnable the first day or any other day in the next succeeding term shall be good and effectual. 1 R. Laws, 91.

In dower after issue joined, and until judgment, 15 days between teste and return of process effectual. *ib.*

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OF

REAL ACTIONS

IN GENERAL.

BOOK I.

CHAPTER I.

WHEN a real action is to be brought for the recovery of lands or hereditaments, the original writ is in the first place to be sued out of the high court of chancery, which is called the *Officina Justiciæ*; and that kind of original must be sued forth as is most agreeable to the nature of the cause, duly considered, according to the rules of law. Wherein observe some cases may admit of several remedies, and one real writ or another may be brought at the election of the demandant, as a *nuper obiit*, or a *mortdancester*, an assize of *novel disseisin*, or a writ of entry in nature of an assize, a *mortdancester*, or a *formedon* in remainder, and many others, as the case may be.

Where to be sued forth.

29 H. 8. 59. 11 H. 4. 55. Co. lib. 2. 61. 2. Co. lib. 6. 7. b. Election of actions.

But this is to be observed as a rule, that where there may be such election, it is the most prudent course to chuse that writ which is of the lower rather than that of a higher nature; for a recovery in that of a lower nature will be no bar to an action of a higher nature. Whereas, on the contrary, a recovery in the higher action may be a bar to that of a

What actions first to chuse.

Co. lib. 6. 7. b. 8. a. Dyer, 5. Co. lib. 4. 43. 9 H. 7. 23.

lower nature; and, therefore, not prudent to sue forth a writ of right, when you may have a writ of entry; or a writ of entry when you may have a *mortdancester*, *ayel*, *besayel;* or these where you may have an assize of *novel disseisin:* and so of other writs *pari ratione.*

2. Every writ generally must have fifteen days at the least between the teste and the return.

(2) In what county to be laid.

3. By the law, every real writ, for the most part, must be brought in the county where the land lies, *Bract.* 189 and 414. If the lands lie in several counties bordering one upon another, the assize must be brought *in confinio comitatus;* and it is said, it ought so to be mentioned in the writ. 35 *H.* 6. 30.

The order of things in a *præcipe.*

4. In every *præcipe quod reddat* an order is to be observed in placing the things demanded in the writ; the more worthy thing should always be placed before the less worthy, the general before the special, and the intire before its parts. Therefore land upon which a house is built, being for the habitation of man, is more worthy than land without a building; and therefore a messuage shall be first demanded, and of messuages a castle before other messuages, and before a manor, though it be part of a manor. 1 *E.* 3. 4. 7 *H.* 6. 39. So land shall be demanded before meadow, pasture, or wood; for land is the *genus* to these; and so *boscus*, wood, shall be demanded before *alnetum*, *salicetum*, which are but *species* of wood. So the intire shall be demanded before the moiety or other part. *F. N. B.* 4 *Regist.* The order of things to be demanded in a *præcipe*, is comprehended in these verses, viz.

Messuage, toft, mill, dove-house, garden land, meadow, pasture, wood, heath, moore, soil where rushes do grow, marsh, the soil and wood where alders grow, the soil where broom doth grow, rent:....
This is the order of the parcels.

5. In every writ of entry of his ancestors' possession, he who demands the inheritance, must say in the writ (which he claims to be his right and inheritance) but not if he be tenant in tail, or for life. But in declaring, he must shew his particular estate. *F. N. B.* 201. Nor he who claims of his own possession, except it be in a *cui in vita*, or *cui ante divortium.* What words to be in a *præcipe.*

6. If one thing be twice demanded (called *bis petitum*) in one and the same *præcipe*, the writ shall abate; as to demand a manor and rent, if the rent be parcel of the manor, the writ shall abate. 3 *E.* 3. 85. So if a manor and an advowson, if the advowson be appendant to the manor. 6 *E.* 3. 267. *M.* 33. *E.* 3. *Br.* 919. So in a formedon of a manor, and of a messuage and land, if the messuage and land be parcel of the manor, the writ shall abate. 46 *E.* 3. 26. 9 *H.* 6. 42. *Bis petitum.*

7. In every *præcipe quod reddat* must be alleged where the land lies, and this must be in a vill, or *lieu conus*, and not in a hamlet. 9 *E.* 4. 36. 8 *E.* 4. 6. 34 *H.* 6. 18. Otherwise in personal actions it may be in a hamlet; and so in dower, where no land in certain is demanded: And also in assize it may be in a hamlet, because the recovery shall be by view of the jurors; and so in a *scire facias* out of a fine, *nuper obiit*, writ of mesne, covenant, waste, *quare impedit*, these may be in a hamlet. 17 *E.* 3. 56. 18 *E.* 3. 11. but otherwise it is of a writ of right of advowson, 9 *E.* 4. 36. The writ must allege the Vill where the land lies.

These real writs lie only against the tenant of the freehold; and, therefore, *non tenure* of the whole, or of parcel, jointenancy with another not named in the writ, intire tenancy of the whole, or several tenancy of parcel when the writ is brought against two or more, are good pleas in abatement at common law; but now by the statute of 25 *E.* 3. *c.* 16. Tenant to the *præcipe.*

non tenure shall not abate the writ but for the quantity. *Lit.* 115. 19 *H.* 6. 32. 37 *H.* 6. 8. 27 *H.* 8. 30.

Demandant, Tenant.

In these real actions, he who brings the writ is called the *demandant*, ; and he against whom it is brought, *tenant*

Incidents before appearance.

For the more distinct and certain knowledge of the nature and proceedings in these actions, I purpose this method following: 1st. To set forth something of the nature of those things that are incidents to these real actions before appearance of the tenant: And under this consideration I shall take, 1st, *Summons.* 2d, *Attachment.* 3d, *Distress.* 4th, *Default.* 5th, *Grand Cape.* 6th, *Saver Default.*

After appearance.

2. Such as are incidents after appearance concerning the writ, as *summons* and *severans*, *non tenure*, *sole tenancy*, *several tenancy*, and *imparlance.*

After appearance before pleading.

3. Such as are incidents after appearance before pleading to the action, as, *view*, *essoin*, *voucher*, *counter-plea of voucher*, *counter plea of warranty*, and *aid prier.*

(4)

After appearance and pleading.

4. Such as are after appearance and after pleading, as *essoin*, *default*, *petit cape*, *receipt*, *departure* in despite of the court, and *judgment.*

Particular actions.

Having gone through these which generally concern all real actions, I shall descend to particular writs, distinctly, under a several head: And in prosecution of this purpose, I shall first, for order sake, begin with writs of right, then proceed with writs of entry, and lastly, to some other particular writs promiscuously; and in the tract of every particular writ, shall endeavour first to shew the nature of the writ, and the several kinds of it, if it be divisible,

2. Then the incident process before and after appearance. 3. Some rules of law, especially of pleading concerning that particular writ or action.

CHAPTER II.

OF SUMMONS.

Summons the first process in all *præcipe quod reddats*

THE original writ in real actions commands the sheriff to summon the tenant to answer the demandant at a certain day. And this is the first process in all *præcipe quod reddats*, which run thus: "We command you that you summon by good summoners, J B, that he be," &c. and therefore the entry upon record, after appearance, is in all those writs thus: "J S was summoned to answer T B of a plea that he render," &c. according to the nature of the writ; this is as much as *vocatio ad jus*, or *citatio* among the civilians.

By whom and how many to be made.

This summons in real actions must be made by two summoners at least. 8 *H.* 6. 5. 35 *H.* 6. 46. And they must be *liberi et legales homines*, that they may testify the truth of the summons, if they come to be examined by the justices. *Fleta, lib.* 6. *c.* 6. *Co. lib.* 6. 158. *b. Fleta, lib.* 4. *c.* 5.

How to be made.

This summons is to be made by the sheriff or his bailiff, either to the person of the tenant or upon the land demanded, and there with the summons warn the tenant to appear and answer; and then the sheriff is to return the writ and the summons. 37 *H.* 6. 26. How the sheriff is to demean himself in summoning the tenant upon the land. *Vide Dalton's office of a sheriff*, 149. *Fleta, ibid.* 43 *E.* 3. 1. The formalities.

Summons actually made formerly.

When real actions were ordinarily used, antiently the summoners were persons who were actually employed by the sheriff for that purpose, and their names returned; whereas, generally now, no actual summons is really given, but names of summoners of course returned by the sheriff upon the writ: but if the tenant at that day should come to wage his law of non-summons, such summons of course would not support the writ. *Vide Modern Rep.* 248. Searl v. Long.

Proclamation. *Stat.* 31 *Eliz. c.* 3.

By the statute of 13 *Eliz. c.* 3. in real actions, proclamation must be made fourteen days before the return of the writ, Sunday after divine service and sermon, &c. which proclamation the sheriff must return with the names of the summoners, or no *grand cape* shall issue, but an *alias* or *pluries* summons; and so far as to the proclamation, the common law is altered.*

Fifteen days between summons and the test of the writ

None shall be summoned to appear to answer forthwith in real actions, *ad statim respondendum*, as Fleta expresses it, *Fleta, lib.* 6. *c.* 6. but there shall be fifteen days at least between the summons and the day to appear and answer; and this is provided by the statute of *Articuli super chartas, c.* 15. 25 *E.* 1. which is but in affirmance of the common law. *Co.* 2. *Inst.* 567. And the reason of so many days was, because so many days' journey, (twenty miles being accounted a day's journey, called *dieta,*) the common law did account a reasonable time for him that was summoned or attached to appear in any part of England wheresoever the court of justice sat. *Bract. lib. A. f.* 235. 19 *H.* 7. *c.* 1. *Co.* 2. *Inst.* 567.

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* This law is copied into our code. 1 Rev. Laws, p. 9.

If the tenant do not appear, being legally summoned, (this is called a default,) a writ called a *grand cape* shall be awarded against him; at the return of which, if he do not appear and save his default by non-summons, or other lawful excuse for his non-appearance, (if the demandant will stand upon the default,) the demandant shall have judgment to have seisin of the land. But of this more shall be said in *Default, Grand Cape*, and *Saver Default*, *Fleta, lib.* 6. c. 6. 379. 50 *E.* 3. 16. 38 *H.* 6. 33. Default, then *grand cape.*

There are judicial writs in the proceedings in the these actions, which require the party to be summoned, as well as the originals, as summons *ad warrantizandum, cape ad valentiam, grand cape, petit cape, petit cape ad valentiam*, of which in their proper places. Summons in judicial writs.

In a *præcipe quod reddat* against tenant for life, if he in the reversion be prayed in aid, and the sheriff return *(nihil)* upon the *scire facias*, or summons *ad auxiliandum*, but that he summoned him in the land demanded *(in terra petita)* it is good. 12 *H.* 4. *p.* 5. 38 *Ass. p.* 18. Summons in *terra petita.*

The entry of Summons upon record before appearance, is thus:

Sallop, ss. "The sheriff was commanded that he should summon by good summoners B that he should be here at this day, to wit, to answer A of a plea that he render unto him one messuage, with the appurtenances in C, &c. And now at this day comes the said A in his own proper person. And the sheriff now returns that the said A has not found pledges to prosecute, &c. Therefore, as before, the said sheriff is commanded that he summon by good summoners the said B, that he be here on such a Record.

day to answer the said A of the plea aforesaid."—*Rast. Entr.* 362. *a.*

This *alias summons* is a judicial writ, and is made upon the original by the prothonotary when the summons for some special cause is not returned by the sheriff upon the original, as for not giving pledges, as in this precedent, or where the sheriff returns *tarde*, or the like. *Reg. Judicial*, 56. *b.* & 2 *b.*

(7) *The entry of an* alias Summons *upon a* Tarde *returned, is thus:*

Sallop, ss. "The sheriff was commanded, &c. that, &c. and now at this day comes the said A by L M his attorney, (or in his own proper person,) and the sheriff then returned that the said writ so late, &c. wherefore as before it was commanded to the said sheriff, that he should summon the said B that he be here," &c. *Rast. Entr.* 417. *a. Journey's Ac.* 2.

Process in *præcipe quod reddats*, first is summons; what in other real actions.

In all *præcipe quod reddats*, which are properly and strictly pleas of land, summons is the first process, and *grand cape* in case of non-appearance; in other real actions, or such as savour of the realty called actions in the realty, the process is in some of them summons, attachment and distress infinite, as in a writ of annuity, *quare impedit*, *quo jure*, *quod permittat*, &c. And sometimes the distress is in lieu of a *grand cape*, as in a *quare impedit*, by the statute *Dyer*, 241. and sometimes for a *petit cape*. In others summons and resummons, as in a *mortdancester*. In others attachment and re-attachment, as in an assize of *novel disseisin*, adn assize of *nusans*; but of these in their proper places. 21 *H.* 6. 56. *F. N. B.* 489. *Eng. F. N. B.* 38. *Rast. Entr.* 76.

Where the process is summons, attachment and distress, the sheriff may summon the party by his lands, goods or person. 22 *H.* 6. 38. *Br. Summons,* 1. 34 *H.* 6. 49. Summons may be by lands, goods or person.

After summons is attachment, where summons and attachment lie in process; and, therefore, of that next in order.

But note, That in every *præcipe quod reddat*, the sheriff is commanded thus: "Command T B that he render unto L M one messuage," &c. So that the sheriff, by the letter of the writ, is first to command the tenant to render the land before he summon him. This is not to be understood of a render in *pais*, for nothing can vest in the demandant by it, but it is to be understood of a render in a court of record. *Vid. Kelw. Rep.* 116. *b.* So that they are but words of form, as the words "take into my hand," in a *petit cape*, or *grand cape*, or *distringas per omnes terras*, &c. in a *distringas*, &c. *ibid. Vid. Co. lib.* 5. 49. *a.*

CHAPTER III. (8)

Of Attachment.

ATTACHMENT in the law is of divers acceptations. In the ordinary acceptation it is a writ to take the body, to answer to some contempt done to a court; or to answer to some action there commenced, and differs nothing from a *capias*; but an attachment in the general may as well be against the goods as the body, and so differs from a *capias*, as a man may be attached by an ox or one hundred sheep. *Kitchen fol.* 263. Quotuplex.

What in real actions.

An attachment after a summons in actions real, is a process to take surety of the defendant by certain of his goods, to appear and answer the action in such a court; where if he appear not, he shall forfeit his goods. And this attachment must be by mere personal things, and not real chattels, nor parcel of his freehold, and in this differs from a *distringas*; and they are to be the defendant's own proper goods, and not borrowed, or goods pawned; and the property of these goods is not out of the party, till he make default. 7 *H.* 6. 10. 27 *H.* 6. 2. 9 *H.* 7. 9. *Br. Attach.* 20. *Co.* 2. *Inst.* 254. *Stat. W.* 1. *c.* 45.

The form of this process is thus:

Writ.

"The king to the sheriff, greeting, &c. put by gages, and safe pledges, J S that he be before the justices, &c. to answer unto B of a plea, &c. and have there the names of the pledges, &c. and this writ," &c. This is judicial, and is made by the prothonotary.

May issue after an essoin.

This process may issue upon default after summons returned by the sheriff, or after summons and an essoin cast, and at the day of the adjournment of the essoin, if the tenant do not warrant his essoin.—*Rast. Entr.* 520. *b.*

(9)

Attachment by goods or by pledges.

Upon this writ the sheriff may take surety by pledges, or attach him by his goods. *Br. Attach.* 1. 7. 9.

Fifteen days between the *teste* and the return.

This attachment ought to be fifteen days between the *teste* and the return, save in assize, and except some particular jurisdictions, where the process by custom, or act of parliament, are returnable *de die in diem*, as in the county Palatine of Chester, and elsewhere. *Br. Attach.* 1. 5. 6. *Co. Lit.* 134. *b.*

Nient Attachiatus per fifteen days, shall be tried by examination of the officer who made the return, and if he be absent, the attachment shall be intended to be good; and the tenant shall be awarded to answer. *Br. Attach.* 6. 12. 17. 18. *Co. lib.* 9. 31. *Nient Attachiatus*, how to be tried.

If the sheriff take sureties by pledges, then the return of the attachment is thus: Return of the attachment.

" The within named J S was attached.

By pledges. { J. D. / J. M."

Or the sheriff may return the tenant attached by his goods, thus:

" The within named J S was attached,
By a dish of the value of 10*d.* or,
By a cow of the value of 30*s.*"

Note—No pledges where attached by goods; otherwise in distress.

A clerk ought to be attached by his person or his lands, (if he have any lay-fee,) and not by his goods. *Fitz. Return.* 23. Clerk how to be attached.

The certainty and value of the goods attached ought to be returned. *Dyer*, 199. *Ander. Rep.* f. 51. *Case*, 127. *Part* 1. The value of the goods attached.

(10)

After the return of the summons upon the original, to the awarding of the attachment, the entry is thus: Record.

Norf. ss. " J S by L his attorney, offered himself on the fourth day against J D, of a plea, &c. And he did not come, and the summoners, &c. And Record.

he is attached that he be here on the octave of St. Hilary to answer," &c.

Entry in Chester.

The entry in the Common Pleas in the county palatine of Chester, is the like, save the words (quarto die) and the time of the return.

All intended where attachment lies in process in real actions.

All that is before said, is intended of attachment in such real actions where the process before appearance is summons, attachment and distress; for in some real actions, as in deceit, the first process or original, is an attachment, and begins, "If A shall make you secure of prosecuting his claim, then put by gages," &c. and after a distress.

The meaning of returning pledges.

The pledges to be amerced in case of default.

If the tenant do not appear upon the return of the attachment, then the pledges are amerced, "Therefore they are in mercy," &c. for the pledges do undertake the defendants shall appear; but pledges are now feigned persons returned of course, and so the amercement is of course.

Entry "therefore they are in mercy," &c.

So note...That the pledges are only to be amerced, if the tenant do not appear. *Vid. Rast. Entr. Q. Imp.* 520. in *process. Vid. Leon.* 2. p. 185. *Crompt. Juriedict. of courts*, 169.

How the entry must be when returned attached by goods.

This is to be understood where the sheriff returns the attachment by pledges; for where he returns the attachment by goods, there the entry is not, "that they be in mercy," because there are no persons to be amerced but the tenant, "that he be in mercy," &c. and the value of the goods to be estreated. *Quere* the entry. *Vid. Dyer*, 199. 34 *H.* 6. 29. The goods are to be forfeited. The entry is in *Dyer*, 199.

CHAPTER IV.

OF DISTRESS.

IN real actions where the process is summons, attachment and distress, if the tenant do not appear at the return of the attachment, then is awarded a distress or *distringas;* and this is made by the prothonotary upon the return of the attachment, and runs thus: Distress when to be awarded.

"The king to the sheriff of B, Greeting, &c. We command you, that you distrain J B, late of, &c. by all his lands and chattels in your bailiwick, so that neither he nor any one for him, do intermeddle therewith until you have other command in that behalf from us: And that you answer us for the issues from the same, so that you may have the body of the said J B before, &c. to answer T B in a plea, &c. The writ. Breve de distringas.

Distress is divided by *Britton,* c. 71. into personal and real; Personal is the distraining all the moveable goods of the party, and the seizing by the sheriff all the profits of the land from the teste of the writ; which being returned by the sheriff, are called issues, and for not appearing, are forfeited to the king, and estreated into the exchequer. This is the distress here intended. *Fitz.* 59. *b.* Distress quotuplex.

Real distress is that which is made only upon the land, and cannot be taken by any common person out of the compass of his fee, as distress for rent. *Ibid.* Distress real.

Distress is further divided into finite and infinite; finite is for some certain times, as once or twice, &c. Distress finite and infinite.

infinite, without limitation of time, till appearance. 52 *H.* 3. *c.* 7.

Grand distress and ordinary.

And it is likewise divided into grand distress and ordinary distress. This grand distress seems to be the same with distress infinite. *Brit. c.* 26 f. 52.

Why called grand distress.

52 *H.* 3. *c.* 7. 9. and 12. *Co.* 2. *Inst.* 254. But I rather think that it is called grand distress when it is awarded in lieu of a *grand cape.*

(12)

Grand distress in lieu of a *petit cape* at common law.

In some real actions for default after appearance, a grand distress issued in lieu of a *petit cape*, at the common law, as in a *quare non admisit, convencione, quare incumbravit, warrantia cartae, contra formam, feoffamenti, contributione faciendo, quare se intrusit, quo jure, secta ad molendinum.* 2 *H.* 4. 1. *b.* 30 *H.* 6. 8. 2 *Inst.* 254.

Distress in lieu of a *grand cape.*

And in some real actions for default before appearance and after summons and attachment, the *distringas* shall issue in lieu of a *grand cape*, by the statute of *W.* 1. *c.* 45. generally, by the statute of *Marlb. c.* 12. in a *quare impedit;* and this is called distress peremptory,* as in *admeasurement de dote*, by the statute of *W.* 2. *c.* 14. *Admeasurement de pastura, quod permittat, warrantia cartæ, breve de recto custodiae, vasto et medio.* 30 *H.* 6. 8. 2 *H.* 4. 1. *b. Dyer*, 241.

Difference between ordinary *distringas* and *grand distringas*, in lieu of *grand cape*, and from that in lieu of a *petit cape.*

The writ of *distringas* in lieu of a *grand cape*, is of the same form with the ordinary *distringas*, save that it is not only to constrain the tenant to answer to the principal plea, but likewise "to hear judgment

* If the tenant or defendant after the first attachment returned, make default, the great distress shall be immediately awarded, and the tenant or defendant shall be distrained from time to time, until he or she do appear, or comply with the purpose of such writ. *N. York* 1 *Revised Laws, p.* 91. *sec.* 32.

for many defaults;" but that in lieu of a *petit cape* is only "to hear judgment for many defaults," without answering to the action. *Fitz.* 94. *b.* 52 *H.* 3. *c.* 9. Return of the distress.

The return by the sheriff of the *distringas*, is thus:

"Manucaptors of the within named J S { J. M. J. L."

"From whence are issues 20*s*."

"*Or otherwise.* J. S. was distrained by all his lands and chattels, according to the form of the within writ, issues thence 20*s*.

"And he was mainprized by { J. L. J. G."

"T. B. *Sheriff*."

"*Or otherwise.* J. S. has nothing in my bailiwick by which he may be distrained, nor is he found therein."

(13)

Where a distress may issue in lieu of a *petit cape* or *grand cape*, if the sheriff returns issues, or *nihil*, and default be made, judgment shall be given against the tenant or defendant, as in a *warrantia cartæ*, *secta ad molendinum*. *Co.* 2. *Inst.* 254, 389, 124. Judgment upon the distress in lieu of a grand cape or petit cape.

Note that now since the statute of *W.* 2. *c.* 45. where a *distringas* may issue in lieu of a *petit cape* at common law for default after appearance; a *distringas* in lieu of a *grand cape* may issue for default before appearance. Stat. W. 1. c. 45. Distress given in lieu of a grand cape, where in lieu of a petit cape at common law.

But where a *distringas* is given by the statute, in lieu of a *grand cape*, it does not therefore follow that a *distringas* may be awarded in lieu of a *petit cape*, as may appear. *Co.* 2. *Inst.* 390. 7 *H.* 4. 15. 12 *H.* 4. 3, 4. In waste a *distringas* is given by the statute of *W.* 2. *c.* 14. in lieu of a *grand cape*, but it does not extend to give a *distringas* after an appearance in lieu of a *petit cape*.

W. 2. c. 14. gives distress in lieu of grand cape, but not in lieu of a petit cape.

The entry of awarding a distringas *is thus :*

Record. *Sallop, ss.* " It was commanded to the sheriff that he should distrain J B by all his lands and chattels, so that for the issues, &c. so that he might have his body before our justices at Westminster, on the octave of St. Hilary, to answer C D of a plea, wherefore seeing (as in waste) as is said, and to hear his judgment for many defaults, and that he should have," &c.

The entry upon record upon default before appearance, upon return of the distringas in a writ of waste, is thus :

Record. *Sallop, ss.* " A offered himself on the fourth day against B in a plea, wherefore, seeing it is provided by the common council, &c. and he did not come. And the sheriff was commanded that he should distrain him, &c. And the sheriff now returns that he was distrained by his chattels to the value of 10*s.* and mainprised by I M and I B, and so he is in mercy," &c.

Judgment upon the grand distress.

And then the plaintiff ought to declare, before the writ of inquiry of waste be awarded, thus:

" And hereupon the said A says that, seeing, &c. and thereupon he brings suit, &c. Therefore the sheriff is commanded that he go in proper person to

the said wasted tenement and cause to come before him, twelve, &c. *Rast. Entr.* 697.

So in a *quare impedit*, and needs not to declare before the writ of inquiry, as in waste. Per *Co.* 2. *Inst.* 125. Yet in *Rast. Entr.* 504. There the plaintiff declares before, which is safest as I conceive. *Vide Rast. Entr.* 507. *a.* So in a writ of *mesne*. *Rast. Entr.* 434. Where the pl. in quare impedit must declare before a writ of inquiry as in waste. (14)

Entry of judgment upon default, after appearance upon the return of the Distringas.

Norfolk, ss. "And he came not, and he had then a day here, until this day, to wit, &c. Afterwards at another time he appeared here in court. Therefore let him be distrained that he be here on such a day, to wit, &c. at which day the sheriff returned that he was distrained, &c. And the said A comes not. Therefore it is considered, &c. And the said J M and J B in mercy," &c. *Rast. Entr.* 226. Record.

CHAPTER V.

*Of Essoin.**

1. ESSOIN, ESSONIUM, from the French *Essonier*, or *Exonier*, to excuse, and is an allegation of an excuse from him that is summoned, or ought to appear and answer to an action, and saves his default for that time, for some just cause of his absence, as sickness, &c. and this is as well for the plaintiff as defendant, in personal actions, and for the demandant as tenant, in real actions. *Co.* 2 *Inst.* 125. *Fleta, lib.* 6. *c.* 7. 8. Essoin, what.

* That no essoin shall be allowed in any suit, and no person shall be permitted to wage his law in any case, except that of non-summons in real actions. 1 Rev. L. 357.

The kinds.

2. There are five kinds of essoins. 1. *In the king's service.* 2. *In the holy land.* 3. *Beyond sea.* 4. *Sick in bed.* 5. *Sick on the road;* and this last is called the common essoin. *Ibid.*

The ground of essoins.

3. And these essoins or excuses of appearance, were provided by the law, to the end no person might be surprised and prejudiced by his absence, in case he had just cause to be excused by any thing that was not through his own default. *Fleta, ibid.*

(15)

Other sorts of essoins.

4. There are some other more special causes of excuse to save default in real actions, as "hostile force," "attacked by robbers," "the force of the floods," "breaking down of bridges," &c. But of these in their proper place, in saver default. *Fleta, lib.* 6. *c.* 7. 382.

Where essoins are allowable.

5. These essoins are allowed both before and after appearance, before and after issue joined; some of these essoins lie not in some actions, and others are limited as to number, (that is, how many essoins shall be,) and time, and persons, by several acts of parliament, and some persons by the common law ought not to be essoined in some particular cases, as after summons in a *grand cape*, the tenant shall not be essoined by the common essoin, because he shall answer to the first default. *Fleta, lib.* 6. f. 396. *c.* 14. and many others, of which see *Fleta, lib.* 6. *c.* 9. 10.

Essoin of being in the king's service, where not allowable.

6. No essoin "of being in the king's service," shall be cast in, 1. *dower*, 2. *quare impedit*, 3. *assize of darrien presentment*, 4. *assize of novel disseisin. Co.* 2. *Inst.* 124. 39 *H.* 6. 40. *Stat. of Essoins*, 12. *E.* 2.

Where allowable.

7. But an essoin "of being in the king's service,"

may be allowed after a *grand* or *petit cape*, or distress taken upon the goods or lands by the statute of essoins. 12 *E.* 2. *Rast. Entr.* 316. *b.* See the statute of essoins; several cases wherein essoins shall not be allowed.

Where the common essoin not allowable.

8. By the statute of *West.* 1. *c.* 42. The common essoin shall not be allowed in *mortdancester*, *juris utrum*, and *attaints* after appearance, and this was for the tenants essoin. And by the statute of *West.* 2. *c.* 28. the demandant shall not essoin in those writs, after an appearance. *Vide Co.* 2. *Inst.* 248. *and* 418; and the reason was because of the great delay and charge of the jurors which appeared the first day in those writs.

In what essoins the essoiner must be sworn.

In the essoin "of being in the king's service," and the rest of the essoins, (except the common essoin,) he who casts the essoin, shall be sworn of the truth of his essoin, by the common law in all essoins before the statute of *Marl. c.* 19. But yet at this day the essoiner shall warrant his essoin by oath in all the former essoins but the common essoin, because of the great delay, which was a year and a day. *Co.* 2. *Inst.* 137.

(16)

W. 1 c. 44. where an essoin shall be turned to a default.

10. By the statute of *West.* 1. *c.* 44. if an essoin "beyond sea" be cast, the demandant may challenge the essoin, and if it be found that the tenant was within the four seas the day of the summons, and three weeks after, the essoin shall be turned to a default, so as the tenant shall lose his land, by reason of the great delay given to the demandant. *Co.* 2. *Inst.* 253.

When the challenge shall be averred.

11. The demandant shall be received to aver his challenge, at the day the parties have by the essoin. 3 *E.* 3. 29. 28 *H.* 6 3.

Essoin of sick in bed returned to a default.

12. And by the statute of *Westm.* 2. *c.* 17. the like law is made for an averment by the demandant and plaintiff, against an essoin "of being sick in bed," which will be turned to a default, if the essoin be false. *Co.* 2. *Inst.* 393.

Fourching by essoin.

13. At the common law, where parceners or joint-tenants were sued, to delay the demandant they might fourch essoins, *i. e.* when they had every one one essoin, they used to essoin again by successive essoins; as in a *præcipe quod reddat* against A B C. A essoins, B and C appear, and have same day given them, at which day A and C appear, and B essoins, and have same day given them, at which day B and A appear, and C essoins; this is lawful at this day, but then at that day B and C appear, and A essoins again, this is fourching by essoin, and this is now remedied by the statute of *W.* 1. *c.* 43. *Co.* 2. *Inst.* 250.

W. 1. c. 43. Fourching by essoins remedied. Stat. Gloucest. c. 10.

14. This act of *W.* 1. *c.* 43. extended only to parceners and joint-tenants, and not to baron and feme, and therefore the statute of Gloucester, *c.* 10. was made to prevent fourching by essoin, where baron and feme were tenants. Both these statutes extend only to real actions. *Co.* 2. *Inst* 321.

(17) *The entry of an essoin upon the essoin roll is thus:*

Record.

Derb. ss. "I S against B in a plea of land by A M in the octave," &c.

Record.

Salop, ss. "W against P in a plea of land by W C in the octave," &c.

Record.

Solop, ss. "I who is in the king's service against R in a plea of land by N in the octave," &c.

Essoin of a Praice in aide—

Record.

Salop, ss. "At which day the said A casts his

essoin of sickness on the road, against the said C in the plea aforesaid, and hath thereupon day by his essoin here until this day, to wit, on such a day next ensuing, and the same day is given to the said B &c. at which day came here as well the said C as the said B by their attornies aforesaid; and hereupon on the fourth day of the plea, the said A although solemnly called comes not. Therefore it is considered that the said B &c. answer alone to the said C in the plea aforesaid, without the said A," &c.—*Rast. f.* 27.* Severance.

The entry of essoins in the great sessions in Chester, are commonly upon the writs or pannels, and sometimes upon a roll. Entry of essoins in Chester.

The entry upon an Essoin Roll in Chester is thus:

" Essoin cast before the said justice, to this same session, to wit, 18th of April, 1 *E.* 6. before Robert Townsend, knight.

Cestr. ss. " John Savage, knt. vs. Humphrey Swinnerton, knt. in a plea of land, by John Cutt, until the said day of the next sessions at Chester," &c. Record.

Cestr. ss. " Laurence Savage, knt. vs. Humphrey Swinnerton, knt. by John Doe, of a plea of waste or of land, until the said day of the next sessions at Chester, to be held before the justice of Chester." Record.

The entry of an Essoin upon the plea roll and other proceedings thereupon is thus: (18)

York, ss. " T H knt. by I M his attorney, offers Record.

* The form in the old edition of Booth appears to me inaccurate and confused, I have adopted the above form from Rastell, as more simple and intelligible.

himself on the fourth day, against P H clerk, in a plea that he, together with M permit him to present a fit person to the church of C which is vacant and within his gift, &c. and he did not come; and he was summoned, &c Therefore he is attached, that he be here on the octave of St. Hilary: And be it known, that the said M has here the same day by his essoin, as appears by the roll of essoins of the first after the octave of the holy Trinity of this same term."

Rast. 520 b.

Record. "Otherwise—And be it known, that the said bishop and prior here at this day cast their essoin *de malo veniendi* against the said R in the said plea, and then had day by their essoin here until the said term," &c.

The like in other actions *mutatis mutandis.*

Entry of the demandant's essoin.

Record. *York, ss.* "The essoiner H offers himself on the fourth day against W in a plea, &c. But because the said H, here on this day has cast his essoin *de malo veniendi,* as well against the said W as the said S in the plea aforesaid, and has here a day by his said essoin until, &c. as appears by the roll of essoins of the second after the octave in that same term. Therefore the said S was told that he be here at the said term, to defend his right if," &c.

When essoin for demandant ought to be cast.

An essoin for the demandant ought to be cast the first day, because he is demandable the first day. 12 *H.* 4. 24. 25. But by *Brian.* 18. *E.* 4. 14. either demandant or tenant may be essoined the fourth day. Note this is at Westminster; but not so in Chester, but the essoin days are either until the next sessions, or if in the sessions time, then *de die in diem.*

15. Note at Westminster, when the tenant essoins in real actions, the demandant shall adjourn the essoin for fifteen days at least. *Vide stat.* 16 *Car. c.* 6. for days in *banco* for mean process. Essoin to be adjourn'd 15 days.

CHAPTER VI. (19)

Of Default before Appearance.

1. DEFAULT before appearance is a non appearance in court at the day of the return of the original writ, for which the tenant in a *Præcipe* shall loose his land, unless he can save, *i. e.* excuse his default, and to that end upon such default a *grand cape* shall be awarded to take the land into the king's hands. *Vide Fleta, lib.* 6. *c.* 14. *Co. Lit.* 259. What.

The entry of a default and judgment upon a grand cape. Entry of a default.

York, ss. " In a writ of entry, A by his attorney offers on the fourth day against B in a plea for four marks of rent with the appurtenances in C which the said A claims against him, of which the said B unjustly &c. has disseised the said A within &c. And he came not and made another default here, to wit, on the octave of St. Hilary after he was summoned &c. So that it was then commanded the sheriff that he should take the said rent with the appurtenances into the hands of our lord the king and the same &c. And that he should summon by good summoners the said B that he should be here at this day to wit on the octave of the Holy Trinity then next following to answer the said A as well in the plea aforesaid as for the said default. Therefore it is considered that the said A recover against B his seisin of the said rent with the appurtenances by the default &c. And the same B in Record.

mercy, &c. And herenpon the said A prays a writ of inquiry of damages, &c. And it is granted to him returnable here," &c. *Rast. Entr.* 281. *a.*

Entry of a default after an essoin.

The entry of a default after an essoin and judgment given without a grand cape and essoin for the demandant.

Record.

Salop, ss. " At which day came here the said L by his attorney aforesaid, and the said B then cast his essoin against the said L in the plea aforesaid, and thereupon he had day by his essoin here until the octave of the holy Trinity then next following, &c. And at that day the attorney of the said L cast his essoin *de malo veniendi* against the said B in the plea aforesaid. And had thereupon day by his essoin here until this day to wit on the octave of St. Michael, then next following the same day was given to the said B here. And now here at this day comes the said L by his attorney aforesaid, and offers himself on the fourth day against the said B in the plea aforesaid. And he although solemnly called comes not. And he had day by his essoin. Therefore it is considered that the said L recover against the said B his seisin of the tenements aforesaid with the appurtenances by the default," &c. *Rast. Entr.* 146. *b.*

(20)

Query. Whether this be legal that the demandant shall recover seisin upon default, after an essoin, without a *grand cape*, for it is contrary to *Br. tit. Gr. Cape.* 3.& *M.* 3 *H.* 4. 3. *p.* 17.

Default of the wife, default of the husband.

Default of one of the tenants.

2. *In Præcipe quod reddat*, the default of the wife is the default of the husband, and the demandant shall recover seisin of the lands. 41. *E.* 3. 24. *Præcipe* against two, one makes default, the demandant shall recover seisin of a moiety. 41 *E.* 3. f. 2. *p.* 7.

3. In a *Præcipe* by two, if one of the demandants make default, and the tenants make default, a summons *ad sequendum simul* shall issue against the demandant that made default, and a *grand cape*, of the whole land against the tenant, and if at the return thereof the demandant that made default appear judgment shall be given for both the demandants for the whole land; but if he did not appear, then only for the moiety for one demandant 4. *H.* 6. 28. *Br. default* 46. *et.* 28 *H.* 6. 3. The next in order, after default before appearance, is a *grand cape*, and therefore of that in the next chapter.

One demandant makes default, and tenant makes default. Summous ad sequendum simul.

CHAPTER VII.

Of a Grand Cape.

1. GRAND CAPE or *cape magnum*, is a judicial writ in a *Præcipe quod reddat*, for lands, tenements and hereditaments, which issues where the tenant makes default at the day in the original writ, and this writ is to take the land into the king's hand; and if the tenant cometh not at the day of the return, he looseth his land. *Bract. lib.* 3. *tract.* 3.

What.

2. And by this writ the land is to be taken into the king's hands, by the view of lawful men which are called veiors, with a summons of the tenant to answer as well to his default, as to the action of the demandant; and in this it differs from the *petit cape*, which is only to answer to the default. 50 *E.* 3. 16. 38 *H.* 6. 33.

Veiors.

3. At the return of the *grand cape*, the tenant may save his default, as to say he was not summoned, &c or was in prison, or disturbed by the rising of waters, &c. but of this in *saver default*.

Saver default, how & when.

The Grand Cape.

The writ. "The king, &c. to the sheriff of C, greeting. Take into our hand by the view of lawful men of your county a third part of one messuage with the appurtenances in N to whose hand soever they may have come within your bailiwick, which I who was the wife of B, in our court, &c. at Westminster, claims for her dower against the said T by default of said T and certify to our justices at Westminster under your seal the day of the taking thereof. And summon by good summoners the said T, that he be before our justices at Westminster, on the octave of St. Hilary then to answer and shew why he was not before our justices at Westminster on the octave of St. Michael the arch-angel, as he was summoned. And have there the names of those by whom this view shall be made, the summoners, and this writ. *Reg. jud.* 2. *b.*

The demandant must make a demand in nature of a count after the default, before he can have a *grand cape* to ascertain the particulars, as acres, *&c.* where the writ is general.

(22) *The return of the Sheriff is thus :*

Return of the sheriff. By virtue of this writ on the tenth day of N. in the year within written, by the view of R. H. and T H. lawful men of my county, I have taken into the hands of the lord the king, the lands within mentioned, as within is commanded me.

Summoners. I. D. I. P.
T. M. Sheriff.

Names of the veiors to be returned. *The names of the veiors and summoners must be returned, Br. Return.* 86.

4. The land ought to be taken into the king's hands 15 days at least before the return of the writ. *Br. grand cape*, 29. & 36. But in *Cheshire*, if it be one, two or three days, it is sufficient, if it be in time of sessions. To be executed 15 days before the return.

5. The sheriff may return "that he has no lands," &c. and this is a good return. *Br. Return* 7. But upon such return, the tenant shall loose his land upon the default. *Fitz.* 113. Note that this return may be made where the *grand cape* is against the vouchee, but not against the tenant. 9 *H.* 6. 41. Return of nul' habet terr' where.

6. When the land is taken into the king's hand, the sheriff shall be answerable for the profits, from the time of the default till judgment for the demandant. *Stamf. Prerog.* 84. Yet by some these words ("take into our hand") are but words of form. *Kiel.* 117. The sheriff to be answerable for the profits.

7. Where the *Præcipe* is against several, and some appear and others make default, and others essoin; judgment shall not be given presently upon the return of the *grand cape* or *petit cape*, till all have appeared, or process be determined against them because perhaps some of them may take the intire tenancy upon them. For this *vid.* 11 *H.* 6. f. 42. & 3 *H.* 6. 52. *Br. gr. cap.* 1. 2 *E.* 4. 21. *b. Br. gr. cap.* 32. 12 *H.* 6. 6. Judgment not to be given till process be determined against all.

(23)

8. If the *grand cape* be not returned there must be an *alias* before judgment. *Vid. Keilw. Rep.* 54. *b.* 55. *a.* Al. Gr. Cape.

The record following of an entry of a *grand cape* in *Chester*, in a *cessavit*, when the courts of the sessions were held every month, or in the name of county courts: Entry of a Gr. cape in Chester.

32. H. 6. "Pleas in the county court of Chester, at Chester, befor Thomas Stanley, knight, justice of our lord the king, of Chester, on Tuesday next, after the feast of the Epiphany, in the 32d year of the reign of our lord king Henry, the sixth after the conquest of England."

Record. *Chester, ss.* "Roger the Abbot of the parsonage and church of Cumbermere in proper person, offered himself against Richard Wallis, in a plea of one toft with the appurtenances in, &c. which the said Roger in the court of the lord the king here claims as his right against the said Richard by the writ of our lord the king of Cessavit per biennium through default of the said Richard. And he came not, therefore the said toft with the appurtenances is taken into the hand of the lord the king, &c. And day, &c. And the said Richard is summoned that he be here at the next county court, to wit, on Tuesday in the first week of lent, now next ensuing, &c. to answer the aforesaid Abbot as well of the chief plea aforesaid as of the said default, &c. And the same day is given to the said Abbot here, &c.

In the next place it is proper to shew how a default may be saved, and therefore the next chapter is of that called *saver default*.

CHAPTER VIII.

Saver Default.

What. 1. SAVER *default*, is to excuse a default, which is properly when a man having made a default in court, comes afterwards at the return of the next process, and alleges a good cause why he did not appear, as imprisonment at the same time, or the like.

2. In real actions, a default for non-appearance must be saved at the return of the *grand cape* in *real præcipe quod reddat*, and at the grand distress in other real actions where the process is summons, attachment and distress peremptory. When to be saved.

3. There are divers causes may be allowed by law for saving a default. 1. By imprisonment. 2. By inundation of waters. 3. By tempest. 4. By breaking of a bridge. 5. For want of due summons. 6. The demandant being essoined and some others, as in *Co. Lit.* 259. Its no excuse to allege that he was sick of great infirmities. *Benlowe's Rep.* 24. *pl.* 96. Causes of saver of default.

4. The most usual is for want of summons,* and this shall be tried by the tenants waging his law of non-summons, (called his *gager de non-summons*,) and not *per pais*, except it be that the tenants are a corporation aggregate, as mayor and commonalty, dean and chapter, or the like, &c. 33 *H.* 6. 8. See this point there debated. Most usual excuse is want of summons.

5. If the summons were not served 15 days before the first day of the return of the writ, the tenant may wage his law of non-summons, for 15 days before the 4th day will not serve. 24 *E.* 3. 46. *Br. Ley gager*, 57. Wager of law of non-summons.

6. The wager of law in non-summons shall be by the tenant in person and not by attorney. 7 *H.* 4. 6.†

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* Note, this is the only case in which our laws admit of the law wager. 1 R. L. 357.

† St. Croix v. Sands. 1 Johns. Rep. p. 328.

A plea of non-summons must be put in on the quarto die post, of the return of the original, and must be verified by affidavit.

Same case, MS. report. The court observed that the tenant should appear in open court and not by attorney to put in his plea of non-summons. And then a day would be assigned for him to come into court with his compurgators to wage his law.

Kent, C. J. seemed of opinion that he should appear on the quarto

Essoin upon making his law.

7. Upon the day given to the tenant to make his law, he may be essoined, but if he makes default afterwards, he shall lose his land, 33 *H.* 6. f. 8.— No common essoin lies for the tenant upon a *grand* or *petit cape*. 19 *H.* 6. 57.

Demandant essoin excuseth default of the tenant.

8. If the demandant be essoined at the return of the *grand cape*, the tenant shall never be put to save his default, but a *distringas ad respondendum* shall issue. 27 *H.* 6. 29. *a.*

How the demandant may release the default.

9. If the demandant will stand upon the default, and hold himself to that, if the default be saved, the writ shall abate, but the demandant may, if he please, release the default, and then the tenant shall only answer to the action, and if it be after issue upon a *petit cape*, if the demandant stand upon the default, the issue is waived and if the tenant save the default, *quære*, whether the whole action or writ shall abate, or only the tenant shall plead *de novo*, 13 *E.* 4. 1. 11 *H.* 7. 1. 27 *H.* 8. 14. *a.* 10 *H.* 7. 21. 3 *E.* 4. 21. But at the day given to the tenant to make his law, the demandant cannot release the default without the tenant's consent.

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No plea allowable before the default saved.

10. Before the default saved, after a *grand cape*, no plea shall be admitted, which proves the writ only abateable, but a plea which proves the writ abated in *facto*, as death of the demandant, *puis le darrein continuance* shall be allowed, 21 *E.* 4. 80. *a.*

The entry of a saver default *by waging law of non-summons, is thus :*——

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die post with his compurgators and then wage his law. Vide 5 Bac. Abr. 424. 2 Salk. 682. 2 Went. 171. Method of performing wager of law.

At the grand or petit cape returned, the tenant may appear by attorney, and tender to wage his law, and take day to wage the same; at which day he ought to appear and wage his law. 7 H. 4. 3. F N B. 26 F.

" A at another day demanded against B two mes- Record.
suages, &c. So that it was then commanded the
sheriff that he should summon the said B that he Saver default.
should be here on the octave &c. to answer the
said A in the plea aforesaid, at which day the said B
made default, so that it was then commanded the
sheriff that he should take the messuage &c. into
the hand of the lord the king &c. And that he
should summon B by good summoners, that he
should be here to wit &c. to answer the said A as
well of the chief plea as of the said default. At
which day &c. And the said A insists upon the
said default which the said B made here on the
said octave &c. And the said B said that he never
was summoned according to the law of the land to
be here on the said octave, to answer the said A in
the plea aforesaid. And this he is ready to de-
fend against him and his suit. As to the court of
the king here shall seem fit. Whereupon it was
considered that he should thereupon wage his law
duodecima manu, &c. And he found pledges to
wage his law. And had day here until &c. At
which day as well the said A as the said B here,
appearing the same B then perfected his law afore-
said, as he had above waged it. Whereupon it is
considered that the said A take nothing by his writ
aforesaid, but be in mercy &c. for his false claim,
&c. That the said B go thereof without a day
&c." *Vid. Rast. Ent.* 417. *Journey's accounts.*

11. Note, in waging law of non-summons, at (26)
the day of making his law he must have eleven per- Duodecima manu.
sons with himself, to swear they believe the tenant
swears true, which is called *duodecima manu;* and
this is by force of the statute of *Magna Charta, c.*
28; whereby it is enacted, that none shall be ad-
mitted to wage his law without credible witnesses.
Vide 37 *H.* 6. 8. *Et. Co.* 2. *Inst.* 45. In practice

there may be fewer than eleven, as the court thinks fit.*

12. Having now done with such things as are incidents to real actions before appearance, I proceed next to those that are incidents after appearance concerning the writ; and first of *summons* and *severans*.

CHAPTER IX.

Of Summons and Severance.†

Where it is

1. SUMMONS and SEVERANCE is where there are several demandants or plaintiffs that are forced to join in one action, and one or more of them refuse to prosecute, and will not appear, then a summons shall be awarded against them that do not appear, that they appear at a certain day to prosecute together with the other demandants or plaintiffs. At the return of which summons, if they appear not, judgment shall be given, that the other demandants shall sue alone, and they that appear not shall be severed. 10 *Ass. pl.* 12.

In what actions.

2. And the *summons* and *severance* lies generally in most real actions, and actions that savour of the realty, as in detinue of charters, *Warrantia Cartæ*, &c. *Co.* 1. *Inst.* 286. *c.* 139. 2 *H.* 4. 2. 11 *H.* 6. 23; but in few personal actions.

The end of summons and severance.

3. And the end and intent of this summons and severance is, that the non-suit of one demandant,

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* Vide Ad hoc. 2 Vent. 171.

It has been said that compurgators are not absolutely necessary, unless plaintiff demands them. 2 Keb. 360. No indictment for perjury lies in wager of law. 1 Inst. 295. 1 Vent. 296.

† The proper name of this title is SEVERANCE, for the Summons is nothing more than a process which must issue in most cases before judgment of severance can be given. 4 Bac. Abr. 660.

should not be the non-suit of the other in real actions, nor the death of him that is severed, should abate the writ after *severance*. Where death shall abate the writ after *severance*, and where not. *Vide Good Learning, Co. lib.* 10. *Read* and *Redman's* case, 134. *Skinner* 39.

4. Severans of the demandant is two-fold; 1 by summons "to prosecute together with," where one of the demandants never appeared: 2 by award of the court, without any process; and this after appearance by non-suiting him that does not appear, and entering judgment that the other *sequatur solus*. *Co.* 1. *Inst.* 139. *b**. How many forts.

The entry of Summons and Severance where the summons was on the land demanded.

Stafford, ss. "P at another day in the court of our lord the king here, demanded against J L, the castle and manor, &c. with the appurtenances in R as the right of said P and B by the writ of our lord the king of *formedon in descender*. And the said B together demanding, &c. then came not, so that it was then commanded the sheriff that he should summon him by good summoners, that he might be here at the day, &c. to prosecute together with, &c. at which day the sheriff then returned here that the said B had nothing in his bailiwick by which he could be summoned. Whereupon it was commanded the sheriff that he should summon him on the said castle and manor that he should be here on this day, to wit, &c. to prosecute together, with &c. if &c. And now here at this day comes the said P by his attorney. And the said B being solemnly called on the fourth day, comes not, and he was together demanding, &c. And the sheriff now returns Record. Summons and Severance.

* Upon summons and severance, judgment shall be for those only who prosecuted without naming those who severed. Cro. Car. 421.

that he had summoned him, &c. Therefore it is considered that the said P prosecute alone without the said B against the said J, as to the half of the said castle and manor, &c. with the appurtenances. And hereupon the said P demands against the said J the half of that castle and manor, &c. with the appurtenances, &c." *Rast. Entr.* 375.

Entry of Summons and Severance without Process.

Record. *Stafford, ss.* "Afterwards the process therein being continued between the said parties of the plea aforesaid by the jury, is put between them in respite here until, &c. in the year, &c. And now here at this day comes as well the said C as the said A by his attorney aforesaid. And the said G and B on the fourth day of the plea, being solemnly called, come not. Therefore, by the consideration of the court of the king here they are severed. And the said C is admitted alone without the said G and B, to prosecute against the said A, as to the half of the messuage, &c. with the appurtenances. And the jury thereupon, as to the said half between the said C and the said A of the plea is put in respite here until, &c." *Rast. Entr.* 593.

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Summons and Severance lies in these actions.

1. Libertate probanda, *F. N. B.* 189.
2. Quare Impedit, *Co. lib.* 10. 34.
3. Quo Jure, *F. N. B.* 309.
4. In rationalibus divisis, *F. N. B.* 311.
5. Monstraverunt, *F. N. B.* 36.
6. Warrantia Cartæ, *Co.* 1. *Inst.* 286.
7. Formedons, *Vide Rast. Entr.*.
8. Assise, 44 *E.* 3. 16. 23. *Ass. p.* 9.
9. Waste, 42 *E.* 3. 20.
10. Bre' de Gard, 38 *E.* 3. 9.
11. Attaint in Real Actions, see in Writs of Error, 29 *Ass.* 35.

Lies not in——

1 Nativo habendo, *F. N. B.* 189.
2 Quid Juris clamat, *Co. lib* 10. 135. but this is a judicial writ.*

CHAPTER X.

Of Non-tenure.

1. AFTER the Writ is brought, and appearance given by the tenant, there are several pleas which may be offered by the tenant in abatement of the writ, and amongst others *Non-tenure.*

* It is in general true that judgment of severance cannot be given in a personal action: 1 Inst. 139. Bro. sum. and sev pl. 8. But it may be given in all mixed actions. 1 Inst. 139. Bro. Chart de terre. pl. 74.

What.

2 *Non-tenure* is a plea in abatement of the writ, whereby the tenant alledges, that he is not tenant of the free-hold of the land or rent demanded, or of some parcel of it at the time of the writ brought, or at any time since. 8 *E.* 3. 410. *Thelw. Digest of writs f.* 238 *sect.* 9. *Rast. Entr.* 440.

The kinds.

3. There is *non-tenure* general, and *non-tenure* special: *non-tenure* general is before defined; *non-tenure* special is where the tenant shews what in-
(29) terest and estate he hath in the land demanded, as that he is tenant for years, in ward, by statute merchant, *Elegit*, or the like, 1 *E.* 3. 1. 2 *E.* 3. 42. 7 *H.* 6 17 21. *Thelwall digest of writs*, 240, 241. *b.* And therefore *Cowel's description of general and special non-tenure* (I conceive) is a mistake; and the same description in *Blunt's nomo-lexicon* following him

Non-tenure abates the writ.

4. If the tenant do not hold any part of the land, *i. e.* be not tenant of the freehold, the writ shall abate, because as *Bracton*, *Amittere non protest quod non habet, & ita cadit breve*, *Bract. lib.* 5. *c.* 27. *f.* 431.

Where nontenure of parcel ſhall abate the whole at common law. Altered by Stat. of 25 E. 3. c. 16.

5. So at common law by *non-tenure* of parcel of an intire thing, as a manor, the whole writ shall abate. But now by the statute of 25 *E.* 3. *c.* 16. by *non-tenure* of parcel, no writ shall abate, but only for the quantity of the *non-tenure* which is alledged and proved; yet it is held, 21 *E.* 4. 29. That in a *cessavit*, *non-tenure* of parcel shall abate the whole writ, though after the statute, because the tenant cannot tender the arrears for the whole demanded*.

* Note. "No writ ſhall be abated by the exception of non-tenure of parcel, but for the quantity of the non-tenure ſo alledged". 1 R. L. 89.

6. *Non-tenure* general may be pleaded without shewing who is tenant, 6 *E.* 3. 249. *Thelw. digest. of writs* 237. But special *non-tenure* must shew who is tenant, *Thelw. digest of writs* 240. *sect.* 41. 8 *H.* 6. 35. Where it muſt be ſhewed who is tenant.

7. In *non-tenure* of parcel, the tenant ought to shew who is tenant, or else to answer to the residue of the land demanded, or otherwise the writ should not abate at common law before the statute, wherein the equity of the common law is observable, that would not suffer a writ good in part to be wholly destroyed, except the tenant shew how the demandant may have a better writ. 36 *H* 6 7. 8 *E.* 4. 6. 10 *E.* 3. 497. *Thelw. digest of writs* 242. *sect.* 8. 10. *Vid. modern rep.* 181. *Fowle and Doble's case.* Who is tenant is to be ſhewed in non-tenure of parcel.

8. But in *Br.* 868. in a *præcipe quod reddat* of three manors, there was *non-tenure* pleaded of one, and the writ not abated for the other two, and this before the statute of 25 *E.* 3.

Non-tenure is not pleadable in these writs——

1. Nuper obiit non-tenure *of Parcel, no plea, Reg* 226. *F. N. B.* 491. *in meo.* 7 *H.* . . 8.
2. Per quæ servitia, *Th. Dig. wr.* 238. *sect.* 12.
3. Waste, 46 *E.* 3. 25. 48 *E.* 3. 19.
4. Deceit, *Thelw.* 240. *sect.* 33.
5. Darrein Presentment, *ibid.*
6. In post Disseisn, *F. N. B.* 373.
7. Recti de rationabile parte, *F. N. B. in meo.* 22.
8. *In* Scire fac non-tenure *of parcel shall not abate the writ, Thelw. sect.* 7.

Non-tenure of a rent how.

9. In pleading of *non-tenure* of a rent, it must be said, that he is not *pernor* of the profits, nor tenant of the land, out of which, &c. at the time of the writ brought, &c. 5 *E.* 4. 22. *Thelw. f.* 241. *sect.* 44. *Rast. Entr.* 440*.

Non-tenure of the lands put in view, and where de terris petitis.

10. After view the pleading of *non-tenure* is of the lands put in view, and needs not say of the lands demanded; but before view it shall be of the lands in demand, *de tenementis petitis*, 20 *E.* 3. 373. *Contra.* 18 *E.* 3. *Br.* 357. *Thelw.* 239. *sect.* 22, 23†.

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* Non-tenure ought to be at the time of plea for it is not sufficient, quod non-tenuit tempore impetrationis brevis, or of the summons Th. Dig. l. 11. c. 23. § 10.

† Upon a plea of non-tenure if it be found for defendant, judgment shall be that defendant go quit. But the demandant may enter, 1 Com. Dig. 36.

CHAPTER XI.

Of Join-tenancy.

1. IN real actions may be pleaded likewise in abatement of the writ *join-tenancy*, *sole-tenancy*, or *several tenancy.*

2. *Join-tenancy* on the part of the defendant or tenant, is when the tenant and some other person do hold the land jointly, *i. e.* are join-tenants of the freehold, and the writ is brought only against one, whereas it ought to be against all the tenants of the freehold; and if it be not, the tenant may plead and demand judgment of the writ, because another is tenant of the freehold with him who is alive, not named. *Vid. Rast. Entr.* 66. *assise pl.* 7 & 8. *Rast. Entr. Formedon* 362. *b. pl.* 4. What.

3. At common law if the tenant had pleaded join-tenancy by deed or fine, the writ must abate of course; for the demandant could not aver sole-tenancy against the deed produced, or the fine, but he might confess and avoid the join-tenancy as to plead a release or other conveyance by one join-tenant to the other, 14 *H.* 6. 8, & 25. *Fitz. Tit. join-tenancy.* 18. *Leon.* 2 *p.* 161. *Fitz. Tit. Joint.* 11, 14. 24 *E.* 3. 51. *Br. Joint.* 22. 20 *H.* 7. *f.* 66*. Where join-tenancy by deed or fine shall abate the writ without anfwer.

4. But now by the statute of *Conjunctim Feoffatis*, 34 *E.* 1. in case of a deed the law is altered, and the demandant or plaintiff shall not be delayed by abating of his writ, but may aver sole-tenancy. *Vid. le Statute.* But as to fine, the law remains as it was at common law, *Dyer* 291. *Leon.* 2 *p.* 161. 24 *E.* 3. 51. *Br. Joint.* 22. 20. *H.* 7. *f.* 66. Stat. de Conjunctim Feoffatis, 34 E. 1.

* Join-tenancy of parcel in cui in vita affiſe and ſcire facias abates the writ for parcel only. But in an affiſe of rent join-tenancy of part of the land whereof &c. abates the whole writ, Th. Dig. l. 11. c. 29.

Where there must be a Profert hic in Cur'

5. *Note*, Though *join-tenancy* be pleaded *ex Dono* or *Feoffamento* of such an one, yet if it be not by deed, the averment may be had against the join-tenancy; and therefore when it is by deed, there is a *Profert hic in Cur'* in the plea, as in the first plea before-mentioned in *Rast Entr.* 66. *b.* and where it is pleaded without deed, there is no *Profert*, *&c.* as in the latter pleading in *Rast. Entr. Formed.* 362. *b. pl.* 4. *Br. Joint.* 26*.

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Where it must be shewed of whose gift.

6. In pleading *join-tenancy* on the part of the tenant, it must be shewed of whose gift, and of what estate, *Fitz. Tit. Join-tenancy*, 31. 3, & 29†.

Difference in pleading non-tenure and join-tenancy.

7. *Note*, A difference between pleading *non-tenure* and *join-tenancy:* in *non-tenure* he must plead, that he was not tenant at the time of the writ purchased, or at any time after; but in *join-tenancy* he may plead *join-tenancy* only at the time of the writ purchased, 37 *H.* 6. 16. *Fitz. Tit Joint.* 24. *Br.* 24. The reason of this difference is worth inquiry; for *Billing* says in the case, that there is great difference as to this point between *non-tenure* and *join-tenancy*, but does not shew wherefore or upon what ground.

Why join-tenancy abates the writ.

Voucher.

8 And the reason why *join-tenancy* shall abate the writ, is, because the tenant would loose the benefit of his voucher, if the other join-tenant be not joined in the writ; for one join-tenant cannot vouch without the other, *Br. Joint.* 6. 8. & 23.

Join-tenancy pleaded by one tenant after another after a former writ abated.

9. And therefore if the tenant plead *join-tenancy* with *K.* and the demandant bring a new writ by

* Join-tenancy by reason of a remainder may be plead without shewing the deed. 6 H 4 63. T. D. l. 11. c 28. § 39.

† In pleading join-tenancy on the part of the demandant it is not necessary to shew of whose gift. 19 H. 6. 32. 21. E. 4. 93. Th. Dig. l. 11, c. 27 § 2.

Journeys Accounts against the tenant and K—the tenant and K may plead *join-tenancy* with C for the benefit of K. who was not privy to the writ at first, *Br. ibid.* 39*E.* 36*.

CHAPTER XII.

Of Sole-tenancy.

What. 1. SOLE-TENANCY is where two or more are made tenants to the writ, and one of them only is tenant of the free-hold of the whole.

Rules of pleading sole-tenancy. 2. But when sole-tenancy is to be pleaded, and how and when it shall abate the writ or not, is a matter well to be considered, as to practical proceedings in real actions in this case. And first.

1 Rule. 1. In pleading intire or sole-tenancy, the tenant must plead over or vouch, (if it be after the demandant hath counted) and not conclude to the writ, otherwise the writ shall not abate. And in such case the plea over in bar, or voucher are not to be answered, but the demandant must maintain his writ. *Quere le reason de ceo.* 10. *E.* 4. 8. 28 *Ass. pl.* 25. 41 *E.* 3. 20. 44 *E.* 3. 33.

Vouch on pleader over.

Where the demandant shall not be forced to maintain his writ. 2. If one of the tenants only take the intire tenancy upon him, and the other make default, say nothing, or plead *non-tenure*, the demandant may answer to the bar without maintaining his writ, but if the other take the intire tenancy likewise, the demandant must maintain his writ. 10 *E.* 4. 8. 41 *E.* 3. 16.

3. Where one of the tenants pleads *non-tenure*, and the other takes the intire tenancy upon him

* The form of pleading join-tenancy on the part of the plaintiff is to say "that the plaintiff has nothing unless jointly with &c." And on the part of the defendant "that he holds jointly &c." Th. Dig. l. 11. c. 27. § 5.

and pleads over, the writ shall only abate against him that pleaded *non-tenure*, 22 *E.* 4. 4. *Rast. Enter.* 276. *b.*

4. If one of the tenants disclaim, and the other take the intire tenancy upon him, and plead over or vouch as he ought, the demandant may answer to the plea in bar, and not maintain his writ. *Rast. Entr.* 276. *Entr. bris'* & 225. *b. Disclaimer.*

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Præcipe against four, & one makes default after appearance, how proceſs is to go.

5. If a *præcipe* be brought against four, and the one disclaims, and two take the intire tenancy upon them, and the fourth makes default after appearance, the *petit cape* shall be awarded against him and returned, and nothing shall be entered of the pleas of the other, but only their appearance till the *petit cape* be returned, because he who made default may perhaps save his default, and take the intire tenancy upon him likewise; and there is no reason to fore-judge him of his tenancy, and though he do not save his default, yet the demandant shall not recover seisin of a fourth part, till the issue of the sole-tenancy be tried betwen him and the other tenants. 46 *E.* 3. 15. 2 *E.* 4. 29. 3 *H.* 6. 53.

When ſole tenancy is to be pleaded without pleading over in bar.

6. Note, that if before appearance, one of the tenants in a *praecipe* make default, and a *grand cape* is awarded, and the other at the return of the *grand cape* take the intire tenancy upon him, he is to plead sole-tenancy, without pleading over or concluding to the writ, but pray that the demandant may count against him; Note the difference, when the plea is after the demandant hath counted, and when it is before, for when it is after, the tenant must plead over in bar, or vouch as before. *Rast. Entr.* 271. *a.* 364, 365.

For the form of pleading sole, and several tenancy. *Vid. postea several-tenancy.*

CHAPTER XIII.

Several-Tenancy.

1. SEVERAL-TENANCY is, when the tenants hold severally several parts of the land demanded, and the writ is brought jointly against them all, the tenants may plead severally, and shew how they hold sole such a part of the tenements demanded, "without this that the said B had any thing therein on the day of suing out the writ or ever after &c." *Rast. Entr.* 365. *a.* This is much of the nature of sole-tenancy, and in pleading several tenancy, the tenant must plead over in bar or vouch, as in sole-tenancy, and not conclude to the writ, and the demandant must maintain his writ. 41 *E.* 3. 20. 42 *E.* 3. 8. 44 *E.* 3. 33. 19 *H.* 6. 14. though the other say nothing; and herein it differs from sole-tenancy, where if one say nothing, the demandant may answer to the bar, and not maintain his writ, as is before said. What, and when. (35) Muſt plead over in bar or vouch.

2. Several tenancy shall abate the whole writ. 27 *H.* 8. 30.* Several tenancy abate the whole writ.

3. Several tenancy may be pleaded by the two tenants after waging of law of *non-summons*, and though they join in waging their law, they shall not be stoped to plead severally, several tenancy; but if two or more take the intire tenancy upon them, and wage their law when there are other tenants named in the writ, they shall be stopped to plead several tenancy afterwards. 42 *E.* 3. 16. When ſeveral tenancy is to be pleaded after waging of law.

4. Several tenancy is not pleadable in *Nup. obiit.* 7. *H.* 6. 8. or in assise, or any other action where no land in certain is demanded. *Br. Sev. Ten.* 18. 2. *Leon. p.* 8. But this is to be understood In what actions it may be pleaded.

* In a writ againſt two, one pleads ſeveral-tenancy of parcel and the other ſays nothing, the writ ſhall not abate, 38 E. 3. 23. T. D l. 11. c. 31. § 15. except for the parcel. 4 E. 4. 36. ſed. que. v. T. D. l. 11. c. 31. § 21.

that several tenancy shall not be pleaded (in an assise, or any other action where no certain land is demanded) to the writ, for after a plaint in an assise, several tenancy may be pleaded, as in *Dyer* 244. Assise against four, three plead several tenancy, and the fourth pleads intire tenancy of the whole, the demandant shall choose his tenant at his peril*.

See *Rast. Entr.* 364, 365. The pleading exactly sole-tenancy and several tenancy, according to the former rules.

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CHAPTER XIV.

Imparlance.

What. 1. AFTER the demandant hath counted, the tenant may pray a day to be given him by the court to answer, which is called an imparlance, in latin, *interlocutio vel interloquela*, and is entered thus—"And the said A B by T L his attorney comes and defends his right when &c. and prays leave to imparle until &c. and he hath, it &c." *Kitchin f.* 200.

The kind. 2. Imparlance is two-fold, general and special. General imparlance is entered as before, special imparlance is when the party prays it with a saving of all advantages, and then is added to the entry "saving all objections as well to the jurisdiction of the court as to the writ and count. *Kitchen, ib.*

No plea to the writ after imparlance. 3. Note that after a general imparlance, no plea to the writ is to be received; but non-tenure, joint-tenancy, several tenancy, may be pleaded in abatement after imparlance. *Vid. Keilw. Rep.* 93. *b. Palmers Rep.* 308.

* In a writ againſt baron and feme ſeveral-tenancy, as that baron holds parcel in his own right, and the other parcel in right of his wife, is not pleadable. 20 E. 3. ſeveral-tenancy: 10 T. D. l. 11. c. 92. § 22.

4. Either demandant or tenant may imparle, and the court may give what day they think fit, and are not bound to the common days; for days of imparlance, are but days of grace, and so of days given for demurrer or the like. "Because the court is not yet advised &c." 8 *E.* 4. 4 *Br. jours.* 52. Demandant or tenant may imparle, days of grace.

5. In the court before the justices of *Chester*, upon a special imparlance in real actions, day is commonly given, and in general practice till the first day of the next sessions, if there has been no default before. Imparlance in Cheshire till the next sessions.

And thus much of such proceedings as concern such dilatories, and pleadings as have reference to the writ and declaration, not going or referring to the matter of the action. The next is of such proceedings as are dilatories, (after the writ is admitted to be good) as are incidents before pleading to the action, as view, essoine, voucher, *counterplea* of voucher, *counterplea* of waranty and aid prayer. (37)

CHAPTER XV.

Of View.

1. In most real actions, after the demandant hath counted, the tenant may demand the view of the land demanded, or if it be a rent or other thing, view of the land out of which it issues. *Nomolexicon Tit. View.* And the reason and ground of this institution in the law was, that a thing certain might be demanded in judgment. What.

2. But because the tenant commonly demands the *view* merely to delay the demandant, and not for want of any certain knowledge of the thing demanded, therefore the stat. of *W.* 2. *c.* 48. 13 *E.* 1. was made to prevent view where it is not neces- In what cases not grantable per stat. W. 2. c. 48.

sary, as in the particular cases enumerated in the statute expounded in *Co.* 2. *Inst**.

Counter-plea of view, where.

3 And therefore, where any demands the *view* in such cases named in the statute, the demandant may counterplead the *view i. e.* alledge matter in pleading, which ousts him of *view*, as where he that loseth land by default brings a *quod ei deforceat* for the recovery of it, the tenant shall not have *view*, because he is well enough ascertained of the land by the former record; so where *view* was had in a former writ, and that writ was abated after view for some mistake that appeared upon the view, as *non-tenure*, misnaming of the town, so in dower, when it is brought against the same tenant that purchased the land of the husband; so if the husband died seised, it's a good *counterplea* of view in dower, 34 *H.* 6. 3. 21 *E.* 4. 22. and some other cases mentioned in the stat. *Vid. Co.* 2. *Inst.* 480.

(38)

Where in dower:

4. *View* in dower, is not to be understood of a writ of dower *unde nihil habet* but other writs of dower, for no *view* lay at common law in dower *unde nihil habet*. But *quære* whether not by the stat. of 12 *E.* 2. *de visu terræ*, not printed in *Poulton*. By that statute, *view* is not to be granted in these several writs, 1. writ of ward. 2. of customs and services. 3. a writ of right of advowson, except there be two churches of one name in one town. But to be allowed in a writ *de dote assignanda*, and *in nuper obiit*. *Vid. Rast. abridg. stat. view* 519. where that stat. *de visu terr'* is mentioned, but not set forth at large, nor in any other printed statute book that I know of.

Where ousted at common law.

But in 45 *E.* 3. *f.* 17. its said that *view* was ousted in four writs at the common law, 1. dower

* When view shall be granted, 1 *R.* 2. 89.

unde nihil habet. 2. *Instrusion.* 3. *Breve d' entry en le quibus.* 4. *Nuper obiit.*

Where granted by some statutes:

6. Whence I collect, that some statute has granted *view* in these writs now, for there are other writs that the common law did not allow *view* in, as well as these, as in writs where there was privity of blood between the tenant and demandant, as in a writ of right *de rationabili parte*, where the ancestor died seised and for the same reason *view* did not lie in a *nuper obiit* till the 12 *E.* 2. which statute perhaps gave *view* in all the other cases, as *Intrusion, brief d' entry, &c. Vid. F. N. B.* 22. & 493.

Not grantable in intrusion.

7. But by 2 *H.* 4. 5. *View* lies not in intrusion, nor in the writ of entry in *le quibus, ibidem*, 8 *H.* 6. 27. *Contr'* 2 *E.* 3. 44. *b.*

View in dower unde nihil habet:

8 Note, that in the writ of dower *unde nihil habet, view* by *Bastal's* entries lies, for there is the writ of *view* in *haec verba*. Though it seems questionable by some, whether *view* lies in a writ of dower *unde nihil habet* or not. *Dyer* 179. 14. *H.* 6. 6*.

Kinds of view.

9 There are two sorts of *view* in real actions 1. *view* by the party 2. *view* by the jurors, as in assise of *novel disseisin*, 3. *waste* 4. assise of *nusanoe* the party shall not have *view* because the jurors shall have view. 9. *H.* 6. 41. *b.* 8 *H.* 6. 27. 19 *H.* 6. 43. 50 *E.* 3. 11.

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* Lord Coke in his commentary on Weſt 2. c. 28. (1 R. L. 89) (which takes away view, in dower of a tenement alienedby husband to tenant or his anceſtor,) obſerves, that view may be had in all other writs of dower except dower unde nihil habet. And that there no view lays at common law becauſe the demandant muſt not be delayed, having nothing to live on. 2 Inſt. 482. 2 Lev. 117.

Not grantable after pleading.

10. *View*, shall not be granted after a day taken *per precem partium*, 46 *E.* 3. 4. nor after pleading to the action, 3 *H.* 6. 55. because he takes cognizance of the land. 29 *E* 3. 30.

Grantable after imparlance.

11. *View* may be granted as well after general imparlance as before, by the general practice, though many books are against it. *Dyer* 210. 20 *H.* 6. 18. 35 *H.* 6. 31. 9 *E.* 4. 31. But it is safest to demand the *view* before imparlance.*

Not grantable in actions of a man's own tort.

12. Regularly, *view* shall not be granted of a man's own wrong or tort; as in writs of entry *sur disseisin* against the disseisor himself, an assise of *nusance* admeasurement of pasture, writs of entry in *le quibus* against the tenant himself or the like, but yet this is to be explained, because it seems to contradict what is said before, as to assise of *nusance*, writ of entry in *le quibus*, *intrusion*. 1. As to the assize of *nusance*, the view shall be of the place to which the *nusance* is done, because it is another thing than is in demand. *Roll. Abridg.* 727. 8 *H.* 6. 18. *b.* 41 *E.* 3. 23. So in a writ of entry *sur disseisin* of a rent, *view* shall be of the land out of which, &c. because it is another thing than is demanded. 8 *H.* 6. 27. 7 *H.* 6. 44. So in the *quibus* of a rent. For the writ of entry in *le quibus* and *intrusion*, *quere*, whether *view* be not granted by statute as is beforesaid: but in the case before of a rent, if it appear to the court that the tenant to the writ is tenant to the land out of which, &c. *view* shall not be granted. 34 *H.* 6. 10.

View of another thing than is demanded.

Plea in abatement after view.

13. After view, the tenant may plead in abatement to the writ, such matter as appears by the view;

* Vail. Ed. Dyer 210 b. in a note: Agreed by the juſtices that non-tenure may be pleaded after imparlance in dower. And by Anderſon that he had a note, that general imparlance may make a bad writ good, but not a ſpecial imparlance.

but I conceive not such matter as is apparent in the writ, for by that means a plea in abatement may be obtained after an imparlance, which is contrary to the former rule, and so the demandant delayed, where there is no necessity, for the tenant might have pleaded such matter before the *view* had. 40 *E.* 3. 35. *Br. view* 13. *Quere*, for by 42 *E.* 3. 23. *b.* & 7 *H.* 6. 34, it seems he shall have a plea in abatement after view for false *latin*, and 11 *H.* 4. 72. *Br. view* 41, it is said by *Hill* that the tenant may plead matter apparent in the writ after *view*, but I conceive this is not law, neither the one nor the other, except the *view* was had before imparlance, or after a special imparlance.

14. When *view* is demanded and granted, there ought to go out a writ called a writ of *view*, and this is to be prosecuted and sued forth by the demandant himself, for his own expedition, because he is to shew the lands to the sheriff, that he may shew them to the party; and the sheriff ought to give notice to the tenant, and the veiors or viewers, *i. e.* to the four knights in a writ of right, of the time of the view taken. 32 *H.* 6. 27. *Fitz. view* 156. (40) Writ of view.

15. *The form of demanding view, and of a writ of* view *in dower, which is in nature of a writ of right, is thus:*

" And the said R by W his attorney, comes and demands a view of the said tenements, with the appurtenances whereof, &c. and he hath it, &c. and day is given to the parties aforesaid, here until, &c. and in the mean time, &c." Record.

The Writ of View.

" The king, &c. We command you that without delay you cause W to have *view* of one messuage, &c. with the appurtenances in B, whereof A, who was the wife of S, in our court, before our justices, &c. claims one third part against the said The writ.

W, as her dower of the endowment of the said S, her former husband, whereof she nothing hath; and inform four knights from those who shall be present at that view, that they be before, &c. to testify of that view, and have there the names of those knights and this writ, &c." *Rast. Entr.* 239. *b.*

The like Writ in a Formedon, only saying thus:

"With the appurtenances in B, which the said S, in our court, before, &c. claims as his right against the said A, by our writ of formedon in descender.

Return of the writ of view.

16. The sheriff may return either that the tenant nor any for him came to take the view; or that none came on the part of the demandant to shew him the land. In the first case, the tenant loses the benefit of view, in the other there is to go out an *alias*.

(41)

Return of the writ of view *is thus*——

"By virtue of the within writ, I the under-written certify that I have caused W in the same writ named to have a view of one messuage &c. with the appurtenances in B which the said A in the court of the lord the king before the justices &c. claimed as his right and inheritance against the said W by writ of our lord the king of formedon in descender. And I have informed four knights who were present at that view that they should be before &c. At the day in the said writ mentioned to testify of that view as by the said writ I was commanded.

R. B. Sheriff.

Or thus.

No one on the part of the said A came to shew me the view of the messuage &c. within written therefore in execution of that writ nothing has yet been done by me.

R. B. Sheriff.

17. Upon the return of the writ of *view* which is the next sessions ordinarily after the awarding of it before the justices of *Chester*, the tenant may have a common essoin, which before the said justices, is but *de die in diem*, but in the *common pleas at Westminster*, in all real actions, except writs of dower, nine common days are given upon every essoin, but in a writ of dower there is given but five. The *view* may be returnable in the sessions week, any day: but then the sheriff may delay it by his return. Essoin upon the return of the writ of view.

18. The manner of counter-pleading the *view* in dower, because the husband died seised. *Vid. Rast. Entr.* 239. *b.* But the precedent there for the tenants replication does not agree with the book in 34 *H.* 6. *f.* 3. *b. per totam cur' i. e.* He ought to say that the husband died not seised of any lands in the same *vill'*, and not (as it is in the precedent) that the husband died not seised of the lands demanded, for by such pleading, he takes upon him cognizance of the land, and then the *view* ought not to be granted. Manner of counterpleading view in dower.

19. When *view* is returned by the sheriff, the demandant must count *de novo*. (42)

CHAPTER XVI.

Of Essoin.

1. AS the tenant may be essoined upon the return of summons before appearance, so he may be essoined upon the return of judicial process after appearance, as upon the return of the writ of *view*, the tenant may be essoined. 12 *H.* 4. 14. And so upon return of a summons *ad auxiliandum*, the praiee in aid may be essoined, and of a summons *ad Warrantizandum*, the vouchee may be essoined, and *idem dies* given to the tenant, demandant, and vouchee, and upon the vouchee's appearing, the tenant may Essoins after appearance.

be essoined again: against the book of 3 *H.* 7. 23. *Hob. Rep.* 46. Earl of *Clanrickards* case.

Tenant may essoin when vouchee appears.

2. And the reason why the tenant may be essoined upon the appearance of the vouchee, is because he may have several pleas to plead against the vouchee, as that he is not the same person, 5 *E.* 3. *Ess.* 54. *Hob. Rep.* 46. 29 *E.* 3. 48. 45. *E.* 3. 24. *b.* The vouchee and tenant may have either of them one essoin, before they enter into the warranty.

Essoin upon venire and other processes returned.

3. So upon the return of the first jury process (as the *venire facias*) the tenant or defendant may be essoined both in real, and personal actions. *Co.* 2. *Inst.* 126.

But because something more largely hath been spoken before of the nature of essoins in general, this shall suffice for essoins after appearance. The next thing in method to treat of is voucher, after the tenant hath appeared, and hath had the *view* and one essoin after.

(43)

CHAPTER XVII.

Of Voucher.

What

1. VOUCHER is a term in the law, and is when the tenant calls another into court to defend the land, or otherwise to have land of him, of the value of the land lost by reason of his warranty; and he that vouches, is called the vouchor, and he that is vouched is called the vouchee, *(vocatus.) Co. Lit.* 101.*

Manner of vouching.

2. *And the manner of Vouching in the Entry and Pleading is thus:*

Record

" And the said S in his proper person, (or by I

* Voucher lies in all real actions for recovery of land except assise. 6 Com, Dig. 437.

B his attorney,) comes and defends his right, when, &c, and thereupon vouches E D to warranty, &c."

And if the vouchee be ready in court, to enter into the warranty, then the entry further is thus—— "And thereupon vouches E D to warranty, &c. who present here in court in his own proper person freely warrants to him the said tenements with the appurtenances, &c." But if the vouchee be not ready in court, then must go out process against the vouchee, which is called a summons *ad warrantizandum*, and then the entry is thus—— "And thereupon vouches to warranty E D to be summoned in the said county, that he be here on the day——by aid of the court, &c. the same day is given to the parties aforesaid there, &c."*

Default of the vouchee. Cape ad valentiam.

3. If upon the summons *ad warrantizandum*, the sheriff return the vouchee summoned, and he makes default, a *cape ad valentiam* shall issue forth for the tenant, but if the sheriff return *nihil*, upon the summons, an *alias* and *pluries* shall issue, and then a *sequatur sub suo periculo*, and then if the vouchee make default, judgment shall be given for the demandant, but no judgment for the tenant to recover in value, because it appears the vouchee hath not assets. *Co. Lit.* 393. *a. and* 101. *b. Rast. Entr.* 687, *and* 240. *a.* So if summons be returned, and default be made and a *cape ad valentiam* issue, and *nihil* be returned, an *alias* and *pluries cape* shall issue, with a *sequatur sub suo periculo* upon the *pluries*. *Rast. Entr.* 377.

(44)

Sequatur sub suo periculo.

Breve de summons in Cheshire.

4. If one be vouched in Lancashire or Cheshire, and pray summons thither, the writ of summons may issue thither from Wastminster. 26 *E.* 3. 59.

* If vouchee is not present he shall have reasonable summons according to the discretion of the justices. 1 Rev. Laws, 86.

The summons ad Warrantizandum runs thus:

The writ of summons ad warrantizandum.

"The king to the sheriff greeting: we command you that you summon by good summoners, M S that he be before our justices, &c. to warrant W ten acres of land, (according to the lands demanded,) with the appurtenances in L which B claims in our court, &c. against the said W as his right and inheritance by our writ of entry *sur disseisin* in the post, (or other writ as the case may be,) and whereof the same W in our same court, vouched the said M to be summoned in your county, to warrant against him, and have there the summoners and this writ, &c." *Rast.* 240. 286. *b. Entr. Bris.*

5. If upon the return of the *cape ad valentiam*, the vouchee makes default again, judgment shall be given for the demandant against the tenant, and for the tenant against the vouchee. The entry thereof, *Vide Rast.* 240. *b.*

The grand cape ad Valentiam is thus:

The writ of cape ad valentiam.

"The king, &c. Take into our hands of the lands of M S, for the default of said M, to the value of one messuage, &c. with the appurtenances in B, which A in our court, &c. claimed as his right and inheritance against W by our writ, &c and whereof the same W in our same court vouched the said M S to be summoned in your county, to warrant against him; and certify by your sealed letters to our justices, &c. the day of the taking; and summon by good summoners, the said M S, that he be before, &c. there to answer, wherefore he was not before our justices, &c. and to hear his judgment thereof. And have there the summoners, and this writ, &c." *Rast. Entr.* 240 *b.* This writ is always before the vouchee has appeared.

Petit cape ad valentiam.

The *petit cape ad Valentiam*, is upon default after appearance, and differs not from this, save that

"there to answer why he was not, &c." is left out, and he summoned to hear judgment. Upon the awarding of the *cape ad Valentiam*, there goes out a writ of enquiry likewise, to enquire of the value of the lands demanded, to the end the sheriff may take the value into the king's hands, and the action is continued in the mean time between the demandant and tenant, by *dies datus est*, &c. (45)

The entry of the cape ad valentiam, *and the writ to inquire of the value, thus*——

"He (the vouchee,) came not and he had a day thereupon by his essoin until this day to wit, on the morrow, &c. afterwards he was summoned &c. Therefore let there be taken into the hands of the king of the lands of the said I to the value &c. and whereof &c. and the day &c. the same day is given to the said W in his own proper person &c. And because it is unknown how much the said three messuages &c. may be worth by the year according to their true value the sheriff is commanded that by the oath of good and lawful men &c. he cause the said three messuages to be extended and appraised according to their true value. And the extent and appraisement which he shall thereupon make, he certify here under his seal &c. And the seals of those &c. And then let there be taken of the lands of the said I to the value &c. in form aforesaid &c." *Rast. Entr.* 687. *a.*

Entry of the cape ad valentiam.

Record.

Ac inquirend' de valore.

5. If the sheriff return *nihil* upon the *grand cape ad valentiam*, then an *al' & plur'* is awarded, and if the same return be made, then a *plus plur'* with a *sequatur sub suo periculo*, which is the last process the tenant can have to bring in the vouchee, and if he do not then appear, the tenant looses the land, and cannot have judgment to recover in value, but fails in his voucher, and therefore it is

Al' plur', & sequatur sub suo periculo.

called a *sequatur sub suo periculo*. Co. 1 *Inst.* 101. *Br. sequatur, &c.* 4.

The entry of the grand cape ad valentiam, al' plur' and sequatur sub suo periculo, Vid. Hast. Entr Titl. Formedon 377 *b.*

The tenant to see the plus' plur' executed.

6. The tenant is to sue forth the *plus plur' sum'* or *plur' cape ad valentiam*, and to see that the sheriff execute it which is the meaning of the awarding the *sequatur sub suo periculo*, which upon the *plur'* is always entered thus——And the said W is informed that it is sued forth at his peril, the same day is given to the said parties here &c. *Vid. f.* 170.

(46) *Br' sequatur sub suo periculo.* 4.

Upon default of the vouchee at the return of the *sequatur sub suo periculo*, its said in *Keilw. Rep.* 41. That the tenant must be called, and if he make default, a *petit cape* must be awarded, and not judgment till the return.*

The tenants neglect upon the sequatur, &c. shall loose the land.

7. And if the sheriff return not the writ through the tenants default, as if he do not sue it forth, or deliver it in time, *&c.* or the like upon the return, the demandant may pray seisin of the land, and alledge the tenants neglect in not prosecuting the writ through the tenants default after the *sequatur sub suo periculo.* And all this may be observed in the precedent before cited, *Hast. Entr* 377 *b.* 14 *H.* 6. 7. 42 *E.* 3. 13. If after the *sequatur, &c.* the writ be returned *tarde*, the tenant shall loose the land. *Vid. Cestr. Record f.* 168.

Tarde upon the sequatur, looses the land.

* The tenant muſt procure the vouchee to appear, otherwiſe there ſhall be judgment for the demandant againſt the tenant for failure of his voucher. Co. Lit 102 a. But per Keilw. 41: this is only on the appearance of the tenant on the return of the ſummons ad warrantizandum for if he then makes default, a petit cape muſt firſt iſſue.

8. Upon every summons *ad warrantizandum* at *Westminster*, there are nine returns between the *teste* and the return; but at *Chester de die in diem*, or more days within the week of the great sessions, but this is practised only in common recoveries, for in actions that are adversary, the writ of summons is returnable the next sessions. *Vid. Co.* 2 *Inst.* 240.

Returns upon summons ad warr' 9 at Weſtminſter; at Cheſter, de die in diem.

9. When the vouchee appears, and offers to warrant the land to the tenant, it is called an entering into the warranty, *&c.* and is entered thus—— And the said A summoned &c. by T, his attorney comes and freely warrants the manor &c. with the appurtenances to him &c. And this is when a summons *ad warrantizandum* has issued forth before, and the vouchee appears by warrant of attorney; but if the vouchee be ready in court to enter into the warranty at the time of the voucher, then the entry is thus——Who is present here in court in his own proper person and freely &c.

Entering into warranty.

Record.

10. When the vouchee has entered into the warranty, he comes in *loco tenentis*, and in judgment of law, is tenant to the demandant, and then the demandant counts against him, as he did against the tenant before. *Co.* 2 *Inst.* 241. 8 *E.* 3. 61.

Vouchee in loco Tenentis.

What pleas the vouchee may have after entering into warranty (47)

1. By the voucher, all pleas which are in *esse* at the time of the voucher, are put into the mouth of the vouchee by the tenant, and the vouchee shall plead them, and not the tenant; and likewise many pleas which come in *esse ex post facto*, and therefore the tenant shall not plead a release made to him after the voucher, but the vouchee shall plead it. 5 *H.* 7. 49, 50. 14 *H.* 6. 7.

May have all pleas in eſſe at time of vouch, er.

What pleas.

2. The vouchee may plead the death of the tenant after the voucher, or that the demandant hath taken husband, or is outlawed, or excommunicated *puis le darrein continuance, per Townsend.* 5 *H* 7. 50. *a.* 43 *E.* 3. 16. *a.*

Abatement of the writ.

3. The vouchee may plead in abatement of the writ, that one recovered against the tenant, pending the writ by action tried, and after the entering into warranty; for the tenant by the warranty may have all manner of advantage that the tenant of the land might have; but if the recovery were before the entering into the warranty, then it seems the vouchee shall not have this plea against the demandant, because he might have counterpleaded the warranty by such plea against the tenant, as in case of two writs pending for the same land, by the same person, the vouchee shall not have the plea against the demandant, because he may plead it against the tenant in counterpleading the warranty, if the tenant does not take advantage of it; but by *Finchden*, the vouchee may have all the pleas aforesaid against the demandant. 41 *E.* 3. 11. *a.*

Death of the first vouchee by the second.

4. The second vouchee may plead the death of the first vouchee. 14 *H.* 6. 20.

Infant, parol demurr.

5 If any of the vouchees be within age, the voucher may vouch such a one within age, and pray that the parol may demurr, which is another great delay to the demandant, and in case the demandant do averr, that he is of full age, then the process is, first a summons to be *viewed*, then an *alias*, a *pluries*, and a *sequatur sub suo periculo*, and if he appear not at the *sequatur*, the land is lost, but if he appear, and be awarded to be of full age, then process shall be awarded against him as vouchee, *i. e.* summons *ad warrantizandum*, *alias*, *pluries*, and *si-*

(48)

Summons to be viewed, al' plur' & sequatur.

quatur, &c. 14 *H.* 6. 7. 20. *Vide Cestr. Record. f.* 166.

Quere, if the vouchee do not appear to be viewed at the *sequatur*, what remedy the tenant or he that vouched him hath, for he cannot recover in value against him (as I conceive) because no process went out against him as vouchee, and he was never summoned; but if he be returned summoned to be *viewed*, and he makes default, then *quere* whether a *cape ad valentiam* may not issue against him, and I suppose it may. Infant makes default at the Sequatur, &c.

Where the vouchor must shew cause of his voucher or may vouch generally.

Where the voucher is out of common course, there he that vouches must shew some cause of the voucher, otherwise the voucher may be over-ruled; as when one vouches himself for saving his estate tail, or himself as heir, or his brother as tenant in borough *English*, or two brothers in *gavel-kind*, and that the younger is within age and the like, because they are vouchers out of common course. *Co.* 2 *Inst.* 246. *b.* 40 *E.* 3. 14. 10 *H.* 7. 21. 22. 16 *H.* 7. 13. 43 *E.* 3. 19.* Where voucher is out of com. course.

2. And the demandant may counterplead the cause in such vouchers. *Co.* 2. *Inst. ibidem.* Counterplea of the cause.

3. If one or two vouchees vouch the tenant or their vouchor, they ought to shew cause, because the voucher cannot stand with a common intent. 11 *H.* 4. 42. So if baron and feme vouch, and the vouchee voucheth them, the cause must be shewed. 44 *E.* 3. 38. *b.* Voucher of the tenant

* So if he vouches himself and a stranger, or himself and another parcener. 2 Roll. 753. l. 15.

The laſt vouchee vouches the firſt.

4. If there be several vouchers over, and the laſt vouchee vouch the first, cause must be shewn, because the demandant cannot counterplead the voucher by the statute, having admitted him as vouchee before, and therefore cause must be shewn, that the demandant may traverse it. 20 *H.* 6. 2. *b.*

Demurrer to the cauſe ſhewed.

5. If the cause be not sufficient, the demandant may demurr to it. 11 *H.* 4. 20. *b.* 14 *H.* 6. 4. *b.* As if one vouch, and shew a deed *hic in curia prolata* for cause, and it appear by the deed that he ought not to vouch by that deed, the voucher shall be over-ruled, for he cannot bind the vouchee by any other deed. *Contr.* 30 *E.* 3. 17. *b.* Or if it appear by the cause shewn, that the vouchee has nothing but a possession, which is defeated by recovery or lawful entry, the voucher lies not. 9 *H.* 6. 49. *b.* 41 *E.* 3. 13. 15. 44 *E* 3. 27; so if one be vouched, and by the cause shewn it appear that he ought to have vouched another with him, the voucher is to be overruled. *Rolls Voucher.* 755.

Where aſſignee muſt ſhew a deed.

6. A man may vouch as assignee without shewing the deed of assignment, if the thing may be granted without deed; as if A infeoff B, and warrant to him and his assigns, and B infeoff C, C may vouch A without shewing any deed of assignment, only alledging to a *que estate* of B. *Co.* 3. *p.* 63. *Lincolne College case.* 26 *E.* 3. 75. 3 *H.* 7. 14. 21 *E.* 4. 36.

Where a re-voucher may be.

Revoucher where the vouchee is returned dead by the ſheriff.

1. If a man be vouched and the vouchee is returned dead by the sheriff, upon the return of the summons *ad warr'* the tenant may vouch again, but yet with this caution, that he cannot vouch a stranger out of the blood of the first vouchee without shewing cause. 41 *E.* 3. 28, 29. 30 *E.* 3. 24. *Quære.* 38 *E.* 3. 27. *b.* 17 *E.* 3. 41. 22 *E.* 3. 3.

Contr. So if the vouchee die after entering into *warranty*, no voucher at large. 4 *H.* 4. 1. *Vid. Rast. Entr. Formedon tit. Voucher* 14. *vid. Dier.* 7. *a.* 13 *H.* 7. 25.

If the vouchee after issue joined make default, and a *petit cape* be awarded, and the vouchee die, no judgment for the demandant, but a re-voucher of one of the blood of the first vouchee. *Keilw. Rep.* 69. *b.*

Re-voucher upon a new original.

2. But in a new original, the tenant may re-vouch at large, though he vouched another before. 30 *E.* 3. 24. *b.*

Where the tenant may re-vouch presently.

3. If one vouch, shewing cause where he ought, when the demandant traverseth cause the tenant may wave the voucher, and re-vouch presently. 17 *E.* 3. 47. But *quære* whether he may re-vouch in such case more than once, for if he should, upon the same reason he may vouch *ad infinitum.*

Re-voucher upon return of cape ad valentiam, if the vouchee be dead.

4. If the vouchee make default upon the return of the *cape ad valentiam* served the tenant may say that the vouchee is dead, and re-vouch, because otherwise the demandant would recover the land, and the tenant could not recover in value against a dead person. 22 *E.* 3. 18.

Vouchers great delays.

5. But because vouchers are great delays to the demandant, and therefore not to be countenanced by the law, when they are used only for delay, provision by acts of parliament is made for preventing of unnecessary and dilatory vouchers, by giving the demandant power to counter-plead the voucher.

Where a stranger may be vouched, not heirs.

6. If the voucher be counter-pleaded, and the vouchee be returned dead by the sheriff, the tenant

may vouch a stranger, but if the voucher be admitted, and the vouchee be returned dead, he cannot vouch a stranger, but the heir of him that was vouched before. 12 *H.* 7. 9. *Br. vo.* 141. 14 *H.* 6. 7. *p.* 60. *Br.* 18.

Counter-plea of Voucher.

What. 1. Counter-plea of voucher is a matter shewed by the demandant in his replication, why the tenant or he that vouches ought not to be allowed such a voucher*.

Kind. 2. There are counter-pleas at common law, and counter-pleas by statute, counter-pleas to the person of the voucher and to the person of the vouchee, counter-pleas by the demandant and the vouchee. 21 *E.* 4. 54. 40 *E.* 3. 37.

What counter-pleas at common law. 3. The counter-pleas at common law were several, as that there is no such person as the vouchee. 7 *E.* 3. 27 That the vouchee is a villain, that the vouchee is dead and several other, *vid. Co.* 2 *Inst.* 245, 246. *Stat.* 14 *E.* 3. *c.* 18. affirm the common law.†

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What not. 4. At common law the demandant could not plead any plea which was a counter-plea of the warranty, and therefore the statute of *Westminster* 1. *c.* 40. gave the counter-pleas there provided for, which statute was made. 3 *E.* 1. and has caused great delays in voucher.

Two kinds of counter-pleas by statute. 5. Two sorts of counter-pleas are given now by that statute. 1. That applicable only to writs

* If vouchee is present in court and enters immediately into warranty the demandant cannot counter-plead, 2 Inst. 243.

† If demandant will aver that the person vouched is dead, or that there is no such person such avermont shall be received and tried without delay. 2 R. L. 86.

of possession, as *Mordancester, Cosinage, Ayel, Nuper, obiit, Intrusion, Besail, &c.* so called because the ancestor was seised the day of his death, or the demandant was seised. *Co. Lib.* 6. *f.* 3. *Markalls case.* 2. The other applicable both to writs of possession and writs of right, as writ of right patent, *Formedons, Escheat, Cessavit, &c,* and other writs of right in their nature. *Markalls case, ibidem.*

6. The counterplea in writs of possession is thus——That the tenant or his ancestors whose heir he is, was the first that entered after the death of him of whose seisin he demands the land*. 1. Counterplea by statute.

The other, and the most common counter-plea is thus——That neither he who is vouched to warranty nor any of his ancestors ever had any seisin of the land or tenement demanded, neither in fee nor service by the hand of the tenant or any of his ancestors since his time, of whose seisin the demandant counts to the time that the writ was purchased, and the plea moved, so that he might infeoff the tenant or his ancestors. The entry of the second counter-plea, *vid. Rast. Entr.* 687. *b. voucher* 7, *and* 378. *b. Formedon A. Voucher.* 2. Counterplea by statute.

7. By this statute of *Westminster.* 1. Vouchers are limited in writs of entry, which make mention of the degrees. None shall vouch any person out of the lien, *i. e.* out of the degrees. But in writs of entry in *le post*, the voucher may be at large. What the degrees are, *vid. Co.* 2 *Inst.* 153. The exposition of this statute of *West. vid. Co.* 2 *Inst.* 239, 240, 241, 242. *&c. Vid. Co.* 2 *Inst.* 153. *Stat. Marlebrige c.* 30. 52 *H.* 3. The nature of writs of entry, and by that statute, the writ of en- Vouchers in writs of entry limited, within the degrees, per. stat. W. 1.

* 1 R. L. 86. proceedings on voucher and counter-pleas of voucher.

try in the *post*, is given in case of more descents than two, or alienations than two, which descents or alienations above two, are called out of the degrees, and such writ of entry out of the degrees is called a writ of entry in the *post*, and before this statute in such case the demandant was put to his writ of right.

Join-tenancy no good counter-plea.

8. Its no good counter-plea to say that the vouchee is join-tenant with others not named, or that he never had any thing but as join-tenant. *Br. Counter-plea de Vouch.* 44 8 *H.* 7 5. 14 *H.* 6. 9. *pl.* 40. *Dyer* 341. The which case of *Dyer* is at large with the pleadings in *Co. Entr. Tit. Formedon from* 328. *b. to* 338. *b.*

Iſſue upon the counter-plea not abated by the death of the vouchee.

9. If the voucher be counter-pleaded, and the parties be at issue, the issue shall proceed, and is not abated though the vouchee die, because he is no party as yet to the record. 50 *E.* 3. 2. *Br. Counter-plea. Vo.* 20. 10 *H.* 7. *f.* 21. *Br. ibidem* 43.

Voucher of a ſtranger.

10. If the voucher be counter-pleaded, and the vouchee be returned dead by the sheriff, the tenant may vouch a stranger without cause shewed, but not if the voucher be admitted, and the vouchee be returned dead, he cannot vouch a stranger, but the heir of him that was vouched before. 12 *H.* 7. 9. *Br. Vo.* 141. 14 *H.* 6. 7. *Br.* 18.

Vouchee may be prayed to be ſummoned in the ſame county, becauſe of lands there.

11. If the vouchee have lands in the county where the action is brought, the demandant may prove it, and pray that he may be summoned there, and this prevents the record from being removed in case of a foreign voucher upon a deed of vouchers or otherwise. 13 *Ass. pl.* 3. *Br. Vo.* 96. *Contr. Br. Vo.* 65.

12. Note that a vouchee cannot confess upon a foreign voucher in *banco*, because they cannot take the confession. *Br. Vo.* 1. Vouchee cannot confefs at Weftminfter.

13. Its no counter-plea at common law or by statute, that he who is vouched, is tenant in common with the vouchor, 17 *E.* 3. 47. *b.* And if he were join-tenant, I conceive the law is the same, for it amounts to a counter-plea of the warranty which the demandant cannot have, and comes in a great measure into the 8th rule before. Join-tenant or tenant in common with the vouchor, not good counter-plea.

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14. He that voucheth with cause shewed, if the cause be traversed, the vouchor may re-vouch presently. 17 *E.* 3. 47. *b. vid. antea Voucher Rule* 3. Re-vouch prefently.

These may serve for rules and directions in managing a foreign voucher. upon a deed of vouchers or otherwise.

15. If upon a counter-plea or otherwise, the voucher be allowed, the entry is thus——Therefore it is considered that, that voucher stand &c *Rast. Entr.* 687. *b. Vo.* 10. If the voucher be dis-allowed, thus——Therefore it is considered that the said B be precluded from having that voucher, &c. Entry quod vocare fiet', & quod non.

Counter-plea of Warranty.

1. As the demandant may counter-plead the voucher, so the vouchee may counter-plead the warranty, *i. e.* alledge cause why he ought not to warrant the land. And this counter-plea of warranty, the demandant cannot have otherwise than as aforesaid by the statute. 40 *E.* 3. 14. 44 *E.* 3. 2. 9 *H.* 6. 50. What.

2. It is a good counter-plea of the warranty that the vouchor is in of another estate than the

Where.

estate to which the warranty is annexed. 14 *H.* 6. 26. *Rast. Entr. Dower* 240. *a. Voucher* 2.

3. A good counter-plea, that the feoffment was made by him to the voucher and a stranger, and to the heirs of the stranger who is living, and not joined in the voucher. 17 *E.* 3. 74. So that he who is vouched, neither had any thing but by disseisin, upon whom the tenant re-entered. 9 *H.* 6. 49. *b.* So the vouchee may plead that he is to warrant but a part of the land. 18 *E.* 3. 40. *b.* 41. So after entering into the warranty, generally he may shew he is to warrant but a fee-tail, or an estate for life. There are several others, *vid. Rast. Entr.* 380. *b. Formedon Voucher* 24.

Where judgment ſhall be given for the demandant.

4. Upon counter-plea of warranty, if the warranty be disallowed upon trial or demurrer, judgment shall be forth-with given for the demandant against the tenant, but if it be allowed, judgment shall be against the tenant, and over in value against the vouchee by the statute of *Westm.* 2. *c.* 6. before which statute the tenant could have no other judgment against the vouchee, but that the vouchee should warrant the land which was a great delay to the demandant. *Co.* 2 *Inst.* 366.*

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Demurrer adjudged the ſame term.

Note, if counter-plea of voucher be adjudged against the tenant, the same term upon demurrer, it is not peremptory; but he cannot vouch again, but may plead in barr. 22 *H.* 6. 40. 42 *E.* 3. 16. But if it be adjourned to another term, it is peremptory, and judgment shall be for the demandant.†

* Vouchee denying his warranty ſhall loſe his land if it be found that he is bound to warrant R. L 87.

† Voucher counter-pleaded may be waived by tenant, and after waiver he can plead in abatement or bar.—So if he demurs to a counter-plea and it is adjudged againſt him in the ſame term.—But if demurrer is adjourned to another term it is peremptory and there ſhall be judgment againſt the tenant. 2 Inſt. 243.

Proceedings how to manage a Deed of Vouchers in a Real Action.

In the statute of 13 *Eliz. chap.* 5.* against fraudulent deeds, &c. made to delay or hinder just and lawful actions, &c. there is a proviso that, that act shall not extend to make void any conveyance, by reason whereof any person shall use any voucher in any writ of *formedon;* so that taking it for granted, that deeds of vouchers may be justly and lawfully used in these actions; at least-wise I shall proceed to shew what a deed of voucher is, and how it is to be made, and how to be used in such actions. It is a conveyance made by him who hath a title to lands and tenements defeasible by a recovery in a *formedon* to several persons, the more the better, as will appear hereafter, to the intent to delay the demandant in his action.

2. It may be made by way of feoffment, but the readiest and easiest way, and which is as good for this purpose, is to make a lease and release to one or two persons, and his or their heirs, to the use of such persons, and their heirs, as are intended to be vouchees, with a proviso contained in the release, that if the *cestuy que uses*, or some of them do not pay to the releasor, naming him at any short day after the date of the release, a certain sum of money, the double or treble value of the lands to be purchased, then the conveyance to be void, &c.

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3. This conveyance must of necessity be made before the *teste* of the original writ of *formedon*, otherwise it will be of no effect. *Coke* 2. *Inst.* 245. And it must be made to those persons that the ten-

* Vid. R. L. 791

ant is sure will be his friends, for otherwise they may lose his lands by making default when summoned, confessing the action, or the like. After the demandant has counted, the tenant may demand the view; and upon the return of the writ of view, the tenant may be essoined; and if more than one tenant, they may forch by essoin; and at the day given by the essoin, the tenant may have a general or special imparlance; and at the day of the imparlance the tenant must either plead or vouch, and then comes in the use of the deed of vouchers.

4. And then it will be best to vouch only one of the persons in the deed of vouchers, because the deed of vouchers will last the longer, and the demandant cannot counterplead the voucher, by reason that that vouchee had a joint estate with the others. For by the statute of Westminster the first, *chap.* 40. the demandant, as this cause is, has no other counterplea to the voucher; but to say that the vouchee or his ancestor never had any thing in the land by which he might have enfeoffed the tenant or his ancestors, but that will do the demandant no good; for though one join-tenant cannot enfeoff another, yet being seized *per my* and *per tout*, he may enfeoff a stranger of the whole, though it be a disseisin of his companion, as to a moiety. 8 *H.* 7.

5 and 6. Besides, as the lord *Coke* says, 2 *Inst.* 244, the words in the statute, *dont il poit feaffment faire*, is spoken but for example; but a fine, release or other conveyance which giveth an estate, is within that law. And though the estate of the vouchees be determined by force of the proviso in the deed of vouchers, yet neither will that avail the demandant; for if the vouchee or any of his ancestors ever had any seisin, though it be voided or determined, yet it is sufficient. *Co. ib.*

7. If the vouchee be returned summoned, then he may essoin, and at the day given by the essoin, he may vouch another of his companions, and so on; and every vouchee may have the like essoin. But to be just to the demandant as well as to the tenant. (56) If the tenant vouches A, who appears and enters into the warranty, and vouches B, who likewise appears and pleads to issue, which issue is found for the demandant, and before judgment entered, either of the vouchees dies, and after the demandant enters his judgment to recover against the tenant, and for the tenant to recover against the first vouchee, and for that vouchee to recover against the second, that judgment will be intirely erroneous. *Keil.* 69. *b.* and 80. *b.* and so it will be as I conceive, if the second vouchee makes default, and the first vouchee dies before judgment, and therefore in such case the demandant must be sure to suggest to the court, that the vouchee is dead, and pray a re-summons. *Vide Br. Re-summons* 7. 39. and 47.

8. The proceedings in Cheshire are thus:—1. The tenant vouches I S in the same county, against whom, if he appears not *gratis* forthwith, there goes forth a summons *ad warrantizandum* returnable the first day of the next sessions, (unless by consent sooner, as in common recoveries.) 2. If the sheriff return him summoned, he is to appear in person, or by attorney, or essoin; for he needs not a *dedimus protestatem* as in a writ of entry *en le post*, in suffering a common recovery, the reason see in *F. N. B.* 26. *b. French.* 3. At the return of summons, the vouchee may essoin, but that is but for one day, and every vouchee may have one essoin, at the day by the essoin, the vouchee is to appear, and then the demandant is to count against the vouchee, and the vouchee may imparle till first day of next sessions, and then essoin for one day, and at the essoin day come, he may vouch over some o-

Proceedings in Cheshire.

Essoin per vouchee.

ther person in the deed of vouchers; and it may be one who has no lands in Cheshire, but in another county, and this greatly delays the demandant, for in such case the action is continued *usque proximam sessionem de sessione in sessionem*, till it be removed by writ out of *chancery*, returnable in the *common pleas* at Westminster, where, when the record is sent, the C. B. makes out a summons *ad warrantizandum* against the vouchee, who at the return of the summons, may be essoined, and at the day by the essoin is to appear as before if he be returned summoned; when the vouchee has appeared, the record is to be remanded to Chester, and day to be given to the parties to the next sessions at Chester, and then the vouchee is to appear, and the demandant to count as before, and the vouchee may have the dilatories as before, and then call to warranty, another of the vouchees, who, if he have no lands in Cheshire, then the record is to be removed to Westminster as before. *Vide Dyer* 69. *Pl.* 35; *see Register*. The writ there which removes the record from Chester upon a *voucher*, *fol.* 6. *Br. Voucher* 152. 156. *See Co. Entr. f.* 342. *tit. Formedon*, where these proceedings upon a record from Chester are entered. *Inter Egerton petentem, and Deane tenentem*, for lands in Smallwood, in *a Formedon en discender*. The roll in Chester is 43 *Eliz.*

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Remanded to Chester.

So that the C. Pleas cannot admit of a voucher over before they remand the record. Vide Kelw. 109 b. there argued.

Paroll to demarr.

9. By this deed of *vouchers*, much further delay may be used, if the vouchee be an infant heir of one of the foffees, if he be vouched as heir, then the tenant may pray that the parol may demur till the full age of the infant, and it ought so to do. *Co. Entr.* 321.

Alias pluries, Sequatur fub fuo periculo.

10. And there may be a further delay still, if the sheriff return upon the summons *ad Warrantizandum* that the *vouchee* has nothing whereby he may be summoned, then the tenant may take

forth an *alias* and after a *pluries* without any prejudice to him, and then a *plus pluries* (called a *pluries* ordinarily) with a *sequatur sub suo periculo:* but then at the return of the *sequatur*, &c. if the tenant do not procure the *vouchee* to appear, he looses his land, but if he appear, (which he must do in such case in person) *F. N. B.* 27. *c.* 13 *E.* 3. *Fitz. Attorney* 74. he may vouch over as before. *Vid. Fitz. t t. vo.* 18. 13 *E.* 3. Process in *Chester* upon a *cape ad valentiam.* And there its said, that no *sequatur sub suo periculo* shall be entered, till after the return of the *pluries i. e.* upon the awarding of the *plus pluries* (except it be in dower) for in dower its said, it must be at the taking out of the *alias.* There's a notable record for this, "8 *H.* 4. Among the records of Chester castle at the county court on Wednesday next after the purification of the blessed Virgin Mary." Vi. Fitz. voucher, 135 & 136. Vid. f. 168.

11. If the sheriff return *tarde* upon the writ of summons *ad warrantizandum*, the tenant may delay the demandant to the *alias pluries* and *sequatur sub suo periculo*, if the *tarde* be returned upon the *alias* and *pluries.* So that in effect, by this deed of *vouchers*, the land can never be recovered, for what by foreign *vouchers*, infants under age, and other dilatories, the *vouchers* are never likely to be spent in the life times of the demandant and tenant, and if either of them die, all falls to the ground, and the demandant or his heir is to begin *de novo*, and the tenant or his his heir may revouch all again. 30 *E.* 3. 24. *b.* Tarde.

12. If a *voucher* in *Chester* be made of one that has lands only in the county of *Lancaster*, *quære*, whether the record must be removed into the *Chancery* by *certiorari* from thence, and then sent by another writ into the county of *Lancaster*, in order to summon the *vouchee* there, or that the record is to be removed (as before in case of other counties Vouchee hath lands in Lancashire, vouched in Chester; how to proceed.

that are not county palatines) into the *common pleas*, for if the *common pleas* can summon the *vouchee* in a connty palatine to appear at *Westminster* to warrant, then the question is out of doors, for then the record must be removed to the *common pleas*; but if they cannot make such summons than by *certiorari* as before, in 26 *E.* 3. 59. *b. Fitz. tit. vo.* 306.

26 E. 3. 59. b. its adjudged, that the tenant pray that the *vouchee* may be summoned in the county of *Lancaster* or *Chester*; the writ shall issue thither, although that generally the king's writ does not run there. *Quære*, of this case.

Chester ss. In a record among the rolls in Chester

33 E. 3. Record. Castle, among the pleas in the county court of Chester, held at Chester, before Bartholomew de Burghesse, justice of the lord the count of Chester, on Wednesday next after the close of Easter, in the 33 year of the reign of Ed. 3. A writ of right is brought by William de Penreth and Margaret his wife, and Elenor who was the wife of A, aide prayer against Robert de Wylaston and Margaret his wife of two parts of the third part of the manor of Wystanston. Margaret the tenant, being received in default of her husband; called to warranty one *Robert de Wermyncham Vicar* of the church of *Frodsham*, and he appeared, and vouched over, and afterwards *Warmynchan* made default, and a *cape ad valenciam* was awarded against him; at the return of the *cape*, he appeared, and to excuse his default, he pleaded that both he and his attorney were imprisoned in *Warrington* in the dutchy of *Lancaster*, and issue was taken upon it, and because the said issue could not be tried in *Cheshire*, day was given to the next county. And in the

(59) mean time issues the writ of our lord the king, &c. And afterwards the record was removed by *certiorari* into the *chancery*, and from thence to the dutchy of *Lancaster*, where both parties appear-

ed, and at the return of the *Venire*, *Warmyncham* made default again, and then the record was removed from *Lancaster* by another writ out of *chancery* into the *chancery* again, and from thence sent by writ to *Chester*, in order to have judgment, and there judgment is given against the tenants to the writ, and for the tenants against *Warmyncham* the vouchee. This record is pleaded *tempore H.* 5. in an assise of *novel disseisin*, and entered at large, with all the several writs at large. Among the pleas of the county court of Chester held at Chester before Gilbert Lord Talbot justice of Chester on Tuesday next before the feast of the Holy Trinity. 4 *H.* 5. Cestr. 88. 4 H. 5.

There seems to be some difference between this and a foreign voucher, because matter of fact which is local, ought to be tried in the proper county, and that can be done no other way, but by *certiorari*. But *quære*, whether this was such a foreign plea as was needful to be tried in *Lancaster*, for I conceive the place of the imprisonment was not material, and therefore the matter not *local*.

9. Note, if the tenant vouch an infant as heir, the demandant may say that he is of full age, and so go to issue, and then the process is a *venire* to summon the infant to appear, and to be viewed by the court; and if he be returned *(nihil)* then goes forth an *alias* and a *pluries*, and another writ with a *sequatur sub suo periculo*, &c. and then if he appear not, whether the sheriff return the writ or not, the tenant loses the land. Therefore it highly concerns the tenant to procure the infant to appear at the return of the last process; and if by inspection of the court the infant is judged of full age, then goes forth a summons *ad warrantizandum*, as before. *Vid. Kielw. Rep.* 85. *b.* Summons ad habendum visum infantis. Venire.

So note, the tenant may greatly delay the de-

mandant by alledging the vouchee within age when he is not, *Co. Entr.* 320. Among the rolls of Chester in the county court of Chester held on Wednesday next after the feast of St. Lucy the Virgin, 3 *H.* 5. between William Brereton knight, and Nicholas the son of Roger de Moldesworth, in a *formedon* in *descender*. *Vid. Rast. Entr.* 379. *b. vid. postea* for this record more at large. *f.* 166.

Cestr ss. 3 H. 5.

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Foreign voucher of a deed must be shewed.

13. The lord *Coke* in his exposition of the 12th chapter of the statute of *Glocester*, *Co.* 2 *Inst.* 325. says that least foreign vouchers should be used for delay, they must shew a *charter &c.* comprehending warranty to the court: but many precedents are otherwise; but admitting that a deed must be shewed, I conceive that must be understood of private jurisdictions, as of cities or other corporations. And the lord *Coke* in his first *Inst.* 102. *a.* seems to be of that opinion.

CHAPTER XVIII.

Of Aid Praier.

What.

1. WHEN real actions are brought against any particular tenant, as tenant for life, by the curtesie, or the like, because they had not the whole estate in themselves to defend, they might pray in aid of him or them in reversion or remainder to plead for them, to defend the inheritance of the land, and this is called *(aid prayer.)**

Kinds.

2. This *aid* is twofold, 1. Of the king. 2. Of a common person for aid of the king, *Vid. Co.* 2 *Inst.* 268, 269, 270.

Aid in personal actions.

3. There's aid likewise in personal actions, as in trespass after issue joined, and in *replevin*; but these

* Aid prayer is a dilatory plea, and must be verified by affidavit. V. 2 Bos. and Pull. 304.

and not to the present purpose. *Vide* 22 *H.* 6. 33.*

4. In assise, aid shall not be allowed of one who is a stranger to the supposal of the writ, 14 *H.* 6. 22. Otherwise in a writ of entry in nature of an assise, 14 *H.* 6. 22. 21 *E.* 4. 15. *b*†. Where to be allowed or not.

5. Tenant in tail shall not have aid of him in remainder in fee, because he hath an inheritance, 2 *E.* 3. 46. nor tenant in tail after possibility, *&c.* because he once had an inheritance in him. 2 *H.* 4. 17. *b.* 11 *H.* 4. 15. 39 *E.* 3. 16. Tenant in tail.

6. Lessee for life, remainder in tail, remainder in fee, the lessee shall have *aid* of him in remainder in tail. 41 *E.* 3. 16. *b.*‡ (61) Lessee for life.

7. In real actions *aid* ought to be demanded at the first day the tenant hath to plead, *i. e.* before imparlance.§ 3. *H.* 6. 5, and shall have *aid* before When to be demanded.

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* Aid in ejectment treſpaſs &c. where by pleading it appears that the title of the inheritance is in diſpute but not otherwiſe, 1 Roll 161. l. 10. 13, 23 Therefore it would ſeem that when a title is queſtioned in ejectment &c. the correct mode to be purſued by defendant is to pray his warrantor in aid. Vide ad hoc, 2 Johns. 3. where Hopkins arguendo ſays, "The party ought always to give notice to the warrantor of the ſuit brought and call upon him to defend it unleſs he does this he can have no right of action againſt the covenanter for not defending him.—Vide poſt. Tit. Warrantia chartæ 8 ad finem.. Aid may alſo be in replevin where the avowry is upon the title. 11 H. 4. 28. b.

† Aid not allowed in aſſiſe, 1 Roll. 161 l. 45.

‡ In avowry upon husband for rent out of land which he has in right of his wife, he ſhall have aid of his wife. 1 Roll. 167. l. 35. 38. 45. ib. 170. l. 7.

If parceners enter upon a title anceſtral or claim by deſcent, the one ſhall have aid of the other. 1 Roll. 181. l. 46 &c. ib 182. l. 5, *&c.* And this after partition between them in law, as well as upon partition by deed; for otherwiſe ſhe cannot have in value pro rata, if ſhe loſes in the action. 1 Roll. 184. One join-tenant ſhall not have aid of his companion. 1 Roll. 167. l. 5.

§ If tenant in a writ of right pray aid after a general imparlance, it is good cauſe of demurrer, and the court will give judgment thereupon that the tenant anſwer alone. 2 Bos. and Pull. 384.

plea pleaded and issue taken. 4 *H.* 6. 30. *b.* For after plea pleaded no *aid* shall be granted. 4 *H.* 6. 30. *b.* 8 *H.* 4. 16.*

Entry. *The Entry of Aid praier is thus*——

Record. "And the said A by T his attorney, comes and says that &c. *(here is the cause of aid pleaded)* and so the said A says, that he holds and at the day of suing out the original writ aforesaid, of the said R he held the tenements aforesaid with the appurtenances, for the term of his life, then to remain to the said B and the heirs male of his body to be begotten, without whom the said A cannot draw into plea said land and tenements, nor answer the said R thereof. And he demands aid of the said B &c. And it is granted to him. Therefore the sheriff is commanded that he summon by good summoners the said B that he be here in fifteen days of Easter, to join with the said A &c. in answering the said B of the plea aforesaid if, &c. and the same day is given to the parties aforesaid here, &c. *Co. Entr.* 327, *and* 341. 49. *a.*"†

Summons ad auxiliandum. 8. Upon demand of aid, and granted, a judicial writ is to be sued out by the tenant (called a summons *ad auxiliandum*)‡ at the return of which if the praiee do not appear or essoin, and after make default, judgment is entered "that the defendant or tenant answer alone." 27 *H.* 8. 4. 4 *H.* 6. 30.

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* Hard 179. In ejectione firmæ after not guilty pleaded, defendant prayed in aid and it was denied. And the chief baron held that in personal actions aid does not lie of a common person till after issue joined upon the right of the matter, but not upon the general issue, because it does not appear to the court whether the right will come in question or no; and if it does not there is no cause of aid: nor can aid be prayed in another term after imparlance, because there it is ad respondendum, and after such an imparlance taken, no aid lies: but in real actions aid prayer of a common person lies before issue joined, because there the title of him in remainder or reverson appears by the plea; for without shewing it, he cannot draw his plea.

† Vide Etham. 3 Bos. and Pull. 385.

‡ Upon a sci. fa. it is a sci. fa in auxilium. 1 Roll 193.

The summons ad auxiliandum *is thus:*

" The king. Whereas J in our court, &c. demanded against W one messuage, &c. in E, from which the said W unjustly and without a judgment disseised the said J after the first, &c (but now within 30 years, &c.) as he says, and the same W afterwards came in our said court, and said that a certain W W was seized (as in the plea when aid was demanded,) &c. and he demanded aid of the said W W which was granted to him. And thereupon we command you that you summon by good summoners the said W W that he be before, &c. on the octave of St. Hillary, to answer the said J, together with the said W, of the plea aforesaid, if he shall be willing; and have there the summoners and this writ." *Rast. Entr.* 271. *b.* The writ of Summons ad auxiliandum.

(62)

This is a writ of summons *ad auxiliandum* in a writ of entry *sur disseisin;* the like in other actions *mutatis mutandis;* but the writ may be made shorter than setting forth at large the estate of the *praiee in aid,* only alledging that the *praiee* is seised in fee, and that the tenant has only an estate for life, &c.

The entry of judgment upon the default of the praiee in aid *upon the summons returned.*

" At which day before our lady the queen at W came as well the said I as the said S by his attorney. And the said A (*the praiee*) although summoned, came not. Therefore it is considered that the said S *(the tenant)* answer the said count of the said I without the said B &c." *Co. lib. Entr.* 49. *a.* Entry. Record.

And upon default after an essoin by the *praiee. Vid. Rast Entr.* 27. *a.*

9. In some cases *aid* shall be granted of another after *aid* was granted before. As if one coparcener who is praied in *aid* by another, make default, the Where aid shall be granted a second time.

coparcener tenant may pray in *aid* of another, from whom the land originally was derived; as if the brother make default, *aid* may be prayed of the uncle upon a partition made between the father of the tenant and the uncle. 17 *E.* 3. 12 *b.* So the lessee for life, after *aid* of him in reversion, who dies, shall have *aid* of his heir, 31 *H.* 6. 10. And so if the heir after dies, he shall have *aid* of his heir. 21 *H.* 6. 38. *b.*

After judgment to answer sole.

10. After judgment to answer sole, yet in some case *aid* may be prayed and had after, as if he in reversion make default, who was prayed in *aid* by baron and feme, if after the husband make default and the wife is received, she shall have *aid* against him in reversion, 12 *R.* 2. *aid.* 123. *Fitz. Abr.*

(63) Counterplea of aid.

11. But because *aid praier* as well as vouchers are great delays to the demandant, and may be false as well as vouchers, therefore the law has provided counterpleas of *aid* as well as of vouchers; of which observe what follows——

Counterpleas of aid.

What is a good counterplea.

It is a good counterplea of *aid*, that the *praiee* hath nothing in the reversion. 12 *H.* 6. 1. or remainder; or that the *praiee* did not demise the land to the tenant, *Rast. Entr.* 27. *The entry of a counterplea. Vid Rast. Entr. ibid**.

And now having gone through those incidents that wait upon real actions after appearance, and before pleading to the action, I come to those that are incidents after appearance and after pleading, as *essoine*, *default*, *petit cape*, *departure in despite of the court*, *receit*, *judgment*, of which some have

* If the issue upon the counterplea of aid be found for plaintiff, final judgment shall be for him: 2 Leo. 32.

been spoken of before, as *essoin* and *default*, and therefore of them less shall be said here; the time when they are, *i. e.* (after pleading) only makes the difference.

CHAPTER XIX. (64)

Of Essoin after pleading.

1. As the tenant may be essoined before appearance and after appearance before pleading, so he may be essoined after pleading. As upon the return of a *venire facias*, *habeas corpora*, and other judicial process. 7 *H.* 6. 14. *Dyer* 324. *b.* 21 *E.* 3. 38. *b.* 7 *H.* 6 14. but in personal actions no essoin is allowable upon the *habeas corpora*, or *distringas*, by the statute of *Westminster* 2. *c.* 27. *Co.* 2. *Inst.* 417. neither can the demandant or bailiff be essoined in a real action upon the *habeas corpora*, *Rast. Entr.* 316. *a.* Essoin after judicial process as venire, hab. corp.

2. If there be several tenants, they may have every one, one essoine after appearance and pleading as well as before, *Co.* 2. *Inst.* 126. and 250. *West.* 1. *c.* 43. 2 *E.* 4. 10. and therefore I conceive the case of essoins in *Hob. Rep. f.* 8. is mistaken, which restrains essoining severally to a writ of partition. Every tenant one essoin.

3. The statute of *Westminster* 1. *c.* 43. was made to prevent fourching by essoin; the statute of *Marlebrige*, *c.* 13. to prevent any more than one essoin after issue joined in personal actions, and the statute of *Westminster* 2. *c.* 27. limited that one essoin to the next process. But real actions stand as to essoins as they were at common law. The next thing in rule is default after appearance. Westm. 1. c. 43 Marlebr. c. 13. Westm. 2. c. 27

CHAPTER XX.

Of Default after Appearance.

1. Default after appearance, differs nothing in the nature of the thing from default before appear- What.

ance, save only in the circumstance of time, that the one is the not appearing nor essoining upon the return of the original, and the other is not appearing, or essoining upon the return of some mesne process, or some other day given when he has appeared before to the original.

Petit cape to be awarded.

2. In the first place, the tenant shall lose his land upon the return of the *grand cape*, in all *præcipe quod reddats* if he cannot save his default as is shewed before; in the other case, a *petit cape* shall be awarded, and upon the return of that, if the tenant cannot save his default, he shall lose his land in all *præcipe quod reddats*.

Grand distress, in lieu of a petit cape.

3. In case of default after appearance in some actions, a *grand distress* shall issue in lieu of a *petit cape*, *Vid. antea c. distress.**

(65)

Default several ways.

4. In real actions, default after appearance is several ways, 1. At the return of the writ of *view Old N. B.* 162. 2. At the return of the *venire facias Rast. Entr.* 30. 279. 3. At the day given to wage battle in a writ of *right*, *Rast. Entr.* 103. *b.* 4. After an *imparlance* the same day, which is called a departure in despite of the court. *Rast. Entr.* 149. 5. 5. At the day given by an essoin. *Rast. Entr.* 30. *a.* 6. At a day given in a superior court, the record being removed from the inferior by *certiorari* or the like, as in dower, *Ne unques accouple*, *&c.* and in other cases. *Rast. Entr.* 229. *a. b.*

Where judgment without petit cape.

5. Note, that in some cases judgment shall be given without a *petit cape* first awarded; in other

* On default before appearance a grand cape issues; and a petit cape on a default after appearance. 1 Lev. 105.

cases a *petit cape* must first issue. Without a *petit cape*, as in the case of default at the day given to wage battle in a writ of *right*; in the case of departure in despite of the court, and in several other cases in our books; as in case an issue be found for the demandant, and after the tenant make default, judgment shall be given without a *petit cape*, for after issue and verdict, nothing remains but judgment. 4 *H.* 6. 28. So if the tenant claim fee in a *quid juris clamat*, and after make default. 30 *E.* 3. 29*.

Upon default, at the return of the *venire facias* in all *præcipe quod reddats*, a *petit cape* shall be awarded, and a *distringas* in lieu of a *petit cape* in actions that are in the reality, as in writs of customs and services, writ of *mesne*, and other writs where attachment and distress lie in the mesne process, for the inquest shall not be taken by default in any real action. 30 *E.* 3. 29.

Petit cape upon return of venire facias.

No inqueſt to be taken by default in real actions.

6. In a *quare impedit*, the defendant appears, and after makes default, at the return of the *venire* a writ to the bishop shall be awarded, and the inquest not to be taken by default, nor a *distringas* first in lieu of a *petit cape*. *Pasch'*. 12 *E.* 2. *Q. Imp.* 168. The reports lately printed.

In Q. imped. writ to the biſhop, and no diſtringas upon default.

7. Upon the default, the *petit cape* is made by the prothonotary *teste* the chief justice, and ought

Return of the petit cape 15 days.

* In a formedon in remainder, the tenant after appearance by attorney and iſſue joined, caſts an eſſoin inſtead of appearing on the return of the venire, which eſſoin being challenged an imparlance is granted. If the tenant at the enſuing term do not ſave his firſt default, the demandant may ſign final judgment, although no petit cape has been awarded. 1 Show. 65.

There are but two caſes where judgment ſhall be on a default after an appearance, without awarding a petit cape. 1ſt, as where there is a default after the merits of the cauſe tried as on a ſummons to hear judgment and the like, and the reaſon here is ſpecial becauſe the cauſe is tried and he has nothing to ſay if he does not ſave his default. 2d, where it is a default, that is a departure in the law in deſpite of the court. ib. 21.

to have fifteen days at least before the return, as well as the *grand cape*, but in *Cheshire*, two or three days is sufficient, if it be in the time of sessions. *Br. grand cape.* 36.

How in Cheshire.

The Petit Cape *runs thus*——

Writ of petit cape.

"The king &c. to the sheriff of B greeting, take into our hands one messuage &c. in C which S in our court before our justices of Chester, at Chester or at Westminster, claimed as his right against M; by the default of the said M. And summon by good summoners the said M that he be before our justices of Chester, at Chester, on the first day of next sessions of the county court of Chester, to be held at Chester, (or on the day after the Sabbath in the same session or at Westminster on the octave of St. Hillary) to hear thereof his judgment, and have there the summoners, &c. and this writ. Witness I. S. &c justice &c."

The return of the sheriff upon the writ is thus.——

Return.

"By virtue of the within writ to me directed on such a day and year, I took into the hands of the lord the king the within mentioned tenements with the appurtenances as within is commanded me."

A. B. Sheriff.

Vid. fol. 26. *grand cape*, and comparing the *grand cape* and *petit cape* together, the words in the several writs do shew wherein they differ.

But because (departure in despite of the court) is a special default upon which judgment shall be given without a *petit cape* first awarded, and is an ordinary default, upon which judgments are given in common recoveries, something shall be said of that in the next chapter.

CHAPTER XXI.

Of Departure in despite of the Court.

1. *A Departure in despite of the court*, is when the tenant when he hath appeared, and hath a day given him by imparlance, or the like, the same term, or if he do not appear when he is called, this is a *departure in despite of the court*, and judgment shall be given for the demandant without a *petit cape*; because the tenant in such case is always intended in law, to be present in court, and for his contempt he shall lose his land. *Vid. nomo Lexicon tit. departure in despite, &c.* and 9 *H.* 6. 58. *vid. postea.* What.

2. But if he imparle to another term, and at the day make default, this is no *departure*, but a *petit cape* shall be first awarded, *Br. departure in, &c.* 2 *Contr'.* 7 *H.* 6. 39. *Yelvert. Rep.* 211. *Lilburn versus Heron.* Imparlance to another term, no departure then.

3. But by *Co. lib.* 8. *Beecher's case, f.* 62. it is there said, that if a certain day be given to the tenant by imparlance, if he do not appear, it is no *departure*, speaking indefinitely as to the same or another term, which I much question for law, as to the same term; for in 7 *H.* 6. 39. it is agreed, that if in the same a day certain be given upon an imparlance, or that no day certain be given, but a *licentia interloquendi* generally, if the tenant or vouchee do not appear when he is called, it is a *departure in despite of the court*, and seisin of the land shall be awarded, as the practice is in all common recoveries. And the recoveries in the court of great sessions of *Chester* are entered upon the default of the common vouchee, *i. e.* after the common vouchee hath appeared and pleaded, then the demandant imparles generally the same sessions without any certain day *(petit licentiam inde interloquendi et habet, &c.)* and then comes into Where no departure if a day certain be given.

Common recoveries in Chester, judgment given upon default of the vouchee.

court again; and the vouchee being called, makes default, which is a *departure in despite of the court*, being in the same sessions, and the vouchee having no day given him by the court, nor imparling to any day certain, but being always intended to be present, therefore judgment is entered without a *petit cape* thus——And the said B (the vouchee) although solemnly called came not but departed in contempt of court and made default, therefore it is considered that the said A recover his seisin &c. *Vid.* 3 *H.* 6. 14. 38 *E.* 3. 13. 18 *E.* 4. 41. 14 *H.* 8. 2. See all this confirmed, *Yelv.* 211. *Lilburn versus Heron;* and *Cr.* 2. *p.* 292. the same case*.

Entry of a departure.

No departure upon dies dat. to another term or sessions.

4. If a day be given by the court upon continuance of process by *dies datus est* to another sessions or another term, and then the tenant make default, this is no *departure;* for he departed with the licence of the court; but in such case a *petit cape* shall be awarded, 7 *H.* 6. 39. 41.

Difference between retraxit and nonsuit.

5. *Note*, that the demandant may withdraw (called a *retraxit*) in despite of the court, as well as the tenant, vouchee, or *praiee in aid*, may depart in despite of the court; in which case judgment shall be given for the tenant, and the demandant shall not be non-suited, though he would. As if the defendant or tenant appear and imparle the same day, and after come into court, and the demandant makes default, this is a *(retraxit)* in contempt of the court, and a bar to the demandant.

* On imparlance to a day certain, if tenant makes default a petit cape is awarded, but it is otherwise where tenant takes a general imparlance for there on his default judgment shall be "becauſe the tenant hath departed in deſpite of the court" becauſe on general imparlance the tenant has taken upon him to be always ready &c. But on ſpecial imparlance to a day certain the tenant is not bound to appear till that day, and there may be reaſon why he may excuſe his default, and therefore he ought not to loſe his land preremptorily. Yelv. 211.

But if the tenant imparles to another day certain, though it be in the same term or in another term, and the demandant then makes default, this shall be construed a non-suit of the demandant, and not a bar. For in the first case the demandant is not demandable, being one and the same day, and therefore always intended to be present in court; and if he withdraw himself, he shall be barred, as is aforesaid. But in the other case the demandant is demandable, in judgment of law, being not present in court; and therefore if he appear not, being called, may be non-suited, 3 *H.* 6. 14. *Br departure in despite, &c.* 1. And there it is said the same law is of the vouchee or tenant, which seems to confirm *Coke's* opinion in *Beecher's case*, that if the tenant do imparle to a day certain, though it be in the same term, and then make default, this is no *departure in despite of the court*, but a *petit cape* shall be awarded, 20 *E.* 2. *Excom.* 28. *Vid. Beecher's case. Co. lib.* 8. 62. the entry of this *retraxit.**

Where demandant may be nonsuited, where not.

(69)

6. In case of default of a tenant for life, against whom a *præcipe* is brought, he in reversion may pray to be received, to be made a party to the suit to defend his right, and to prevent the losing of the land, and this leads to the last incident in my method, *viz.* receit.

Receit upon default of a tenant for life.

CHAPTER XXII.

Receit.

1. Receit or *receptio*, is the admission of a person, party to a writ, or a stranger thereunto, to

What.

* Retraxit cannot be unless plaintiff or defendant be in court in propria persona; so that where three coparceners were plaintiffs in a writ of deceit and two of them appeared in person and the third by attorney, and said "they would not further prosecute," they could not, because one was by attorney, wherefore they were non-suit. 8 Rep 115. For the law requires the party to appear in proper person to make the retraxit, because it shall be a perpetual bar. ib. 116. It is a voluntary acknowledgment that he hath no cause of action. ib. 117. V. 2 Cro. 211.

* If the demandant or plaintiff acknowledge quod non vult ulterius prosequi this is a retraxit. Co. Lit. 139. a 2. Cro. 211. 3 Lev. 177.

whom a reversion or remainder appertaineth, in default of another person to defend his or her freehold or inheritance; the law saith, *admittatur. vid. Co.* 1. *Inst.* 192. *b.*

Two actions concur.

2. And in this case, two actions concur, one between the demandant and tenant, and the other between the tenant by receit and the demandant. *Co. ibidem.*

Receit by stat. of W. 2. c. 3.

3. This receit is given by the statute of *Westminster.* 2. *c.* 3. 1. in case where a *præcipe* is brought against husband and wife, for the land of the wife; if the husband make default or render the land, or upon *nihil dicit*, the wife may be received to defend her right before judgment given. 2. to him in reversion or remainder, where an action is brought against tenant in dower, by the curtesie, after possibility of issue extinct or any other tenant for life, and they make default or render. *Co.* 2 *Inst.* 345.*

Termor may be received though party to the writ. Stat. Glo. 6 E. 1.

4. A termor, though he be party to the writ, may be received by virtue of the statute of *Glocester*, 6 *E.* 1. for he may be made a party by *Covin.* 3. *Leon. p.* 168. *Williams v. Drewry.* but this statute extends only to give receit to a termor in case of the default or reddition, but says nothing of faint pleading; but now the stat. of 21 *H.* 8. *c.* 11. gives receit to the termor both upon default, reddition, and faint pleading, *vid.* the statute of *Glocester* expounded *per Coke lit.* 46. in case of a termor, execution is suspended, but no judgment stayed.†

(70)

Q. whether tenant per elegit, or stat. March, be not termors within this stat. Vid Keilw. 109 Hern. Pl. 353.

In what cases the stat. of W. 2. c. 3. extends

5. The statute of *Westminster* 2. *c.* 3. extends only to default, *nient dedire*, or render, and not to faint pleader which is remedied by the statute of 13 *R.* 2. *c.* 17. as to them in reversion or remain-

* 1 Rev. Laws, 526. † Ib. 527.

der: but *quære*, whether the wife shall be received upon a faint pleader of the husband, and it seems not, unless she be within the equity of the statute of *Westminster* 2. *c.* 3.*

6. The time of praying to be received, is when judgment is to be given for the demandant, without further process, as if the tenant appear, and after he depart in despite of the court, then he in reversion is to be received. *Co.* 2 *Inst.* 346. 7 *H.* 4. 15. 3 *Cr. p.* 826. 13 *H.* 7. 35. so no receit of the wife for default of the husband till return of the *grand cape* or *petit cape*, as the case may be. *Keilw. Rep.* 35. *b*†. Time of receit.

7. When he in reversion is received, then the demandant shall count against him *de novo*, so that if the former count were not good, no advantage shall be taken of that, for by the receit, the former count is waived. 33 *H.* 6. 53. 3. *Cr. p.* 826. *Co.* 2. *Inst.* 345‡. Count de novo.

8. He that is received, may plead almost all pleas, and take all advantages as the principal tenant might have done, as age, voucher, aid praier, and the like. *Br. receit* 62. 21 *H.* 6. 28. *Co.* 2 *Inst.* 346. he that is received, may be essoined. What pleas he may plead.

9. He that is received cannot imparle, and if he make default, it is peremptory, and judgment shall Cannot imparl.

* She shall be received. Cro. Eliz. 826. 8. E. 2. 2 Inst. 343. contra.

† He who prays to be received before judgment, suggests a collusion between the plaintiff and defendant. Rob. Ent. 253. That it ought to be suggested. 3 Leo. 168. 9. All except Anderson agreed that it is not traversable, &c.

‡ If the wife be received there need not be a declaration de novo, for she was party to the suit before. Cro. Eliz. 826. And it seems doubtful whether in the case of a reverfioner, &c. there shall be a declaration de novo, for he comes paratus respondere to the demandant, and takes notice of the demand. Vide Cro. Eliz 826. Declaration de novo. Mo. 34. e. cont. by all the justices.

be entered against the principal tenant, without taking notice of the tenant by receit; because the tenant by receit ought always to be ready in court, *paratus petenti respondere.* 21 *H.* 6. 48. 1. *Cr. p.* 262.

(71) *Entry of receit of the feme upon default of the husband upon the* petit cape, *is thus*——

Record

Salop, ss. "And the sheriff now returns that he hath taken &c. and that he hath summoned &c. And hereupon the said A. (the demandant) prays seisin of the said tenements with the appurtenances, by the default of the said J (the tenant) to be adjudged to him &c. and hereupon the said B (the tenant by receit being a feme, in default of her husband) in her proper person, comes and says that the said tenements are her right; whereupon, inasmuch as she comes before judgment rendered, prepared to answer the said A (the demandant) and to defend his right, she prays that she by the default of J (her husband the tenant) her husband, may not thereupon lose her right, but that she may be admitted to defend her right therein &c. And she is admitted &c. and hereupon &c. (the tenant by receit pleads in abatement of the writ.") *Rast.* 30. *a. in Ayle.*

Where cauſe of receit muſt be ſhewed.

Note, That the wife being party to the writ, needs not shew any cause to be received, but a stranger must shew how he has the reversion in him. 33 *H.* 6. 39. *Co.* 2. *Inst.* 345. as in the entry before and hereafter may be observed.

Entry.

The entry of receit of him in reversion, where the tenant makes default upon the return of the grand cape.

Norfolk, ss. "And the sheriff now certifies the day of the taking &c. and that he hath summoned &c. and hereupon the said J (the demandant) prays seisin

of the tenements aforesaid with the appurtenances, by default of the said N to be adjudged to him &c. and hereupon the said A B comes here into court in his own proper person, and says that a certain &c. (And then pleads how such an one was seised and leased, and shews how the reversion came to him)——whereupon inasmuch as he comes before judgment rendered &c." as before. *Rast. Entr.* 140. *a. b. Cui in vita.*

Vid. The entry of a receit of a feme in reversion upon a *(feint pleder)* where a lease and reversion is pleaded by *fine sur grant et render. Rast. Entr.* 29. *a. Ayle.* and 581. *a.* where the lease and reversion is pleaded.

(72)

Note, That a *feint pleader* is where the plea is false and covenous, or where the tenant does not that which by law he ought, in order to defend the land of covin between him and the demandant; as when the tenant for life neither prays in aid of him in reversion, nor vouches him to warranty. Feint pleder what.

10. *Receit* may be counter-pleaded as well as voucher and *aid praier* to prevent delay. And the common counter-plea of *receit* is, that he who prays to be received, had nothing in the land, *i. e.* the reversion at the time of the writ brought. But there are other counter-pleas likewise: as, 1. where a reversion is created hanging the writ. 4 *E.* 4. 14 18 *E.* 4. 25. *Rast. Entr.* 582. *a.* but if the reversion descend *pendente brevi*, I conceive he may be received. *Rast. Entr.* 374. *b. Formedon* seems to warrant so much. 2*ly.* where he who prays to be received, was prayed in aid by the tenant for life, and refused to join. 4 *E.* 2. 160. 18 *E.* 3. 13. *Co.* 2. *Inst.* 345. Counterplea of receit. Keil. Rep. 71.

Entry.

The entry of the Counter-plea, is thus——

Suffolk, ss. "And the said A not admitting any thing by the said S above alledged, says that the same S to any right in the said mesuage &c. above demanded, ought not to be admitted, because he says that at the day of purchasing his said writ, to wit, on such a day &c. in the year &c. the said S had nothing in reversion of the said tenements with the appurtenances, and this he is ready to verify, wherefore he prays judgment, and seisin of those tenements to be adjudged to him &c." *Rast. Entr.* 581. *b.*

Judgment now comes next in order, which is the end of all real actions, and the consummation of all judicial process and proceedings.

CHAPTER XXIII.

Of Judgment.

What.

1. Judgment, *quasi Juris dictum*, the very voice of law and right, and therefore *semper pro veritate accipitur. Co. Lit.* 39.

Sorts.

2. In real actions some judgments are final, some not final, some interlocutory, some definitive or the last judgment. Final, such as do so bar all right and claim, that he, against whom such judgment is given, can never have any more actions for the land whilst that judgment stands in force unreversed. As judgment in a writ of right after the [*Mise*] joined, or non-suit by the demandant. And judgment in attaint is final.

Final.

Interlocutory.

Interlocutory, are such, as after which, there is another judgment to be given in the same action, as in a *partitione facienda*, the first is, *quod partitio fiat*, and when partition is made, and returned by the sheriff, there the definitive judgment is *quod partitio prædicta firma et stabilis imperpetuum teneatur, &c. Co.* 1 *Inst.* 294. *Dyer.* 301. *Co.* 1 *Inst.* 167. *Co. lib.* 11. *f.* 49.

3. Regularly, every judgment ought to be given according to the original writ both in real and personal actions. 12 *E.* 4. 6. *Co.* 2. *Inst.* 236. And therefore if two be demandants, judgment cannot be entered for one, except in two cases in assise, 1. By a man and his wife, for lands in right of his wife. 2. By two joint-tenants, in which cases they may both recover seisin of the land, and one only damages for his goods taken upon the land. *Co.* 2 *Inst.* 236. Judgment must be according to the original.

4. Judgment is to be entered when the right is known, and that may be either by implication and judgment of law, as, 1. When a tenant makes default either before or after appearance, and due process returned as before, 2. By direct acknowledgement of the party, as by confession, or 3. By verdict of 12 men. *Rast. Entr.* 367, 368. *a.* see the entry upon confession and default, and *nient dedire*, *Co. Entr.* 327. *b.* When to be entered.

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5. Note, that in some cases judgment shall not be entered upon default, till the jury have inquired of the points in the writ, and if these be not found true for the demandant, judgment shall be entered for the tenant, notwithstanding the default. As in an assise of *Mordancester*, the jury shall enquire of the three points in the writ, 1. Whether the ancestor was seised in fee the day of his death 2. Whether the ancestor died within 50 years next before the teste of the writ. 3. Whether the demandant be next heir to him that so died. *Co.* 2 *Inst.* 399. 4 *E.* 2. *Mordancester* 38. 31. *Mordancester* 58. Sometimes not upon default till the jury inquire upon the points in the writ.

6. In *praecipe quod reddats*, the judgment for the demandant is always that he shall recover seisin of the land. "Therefore it is considered that the said S recover his seisin of the messuages aforesaid with the appurtenances, by default (if it be by de- How entered.

fault,) and the said I in mercy &c." If it be by confession, then it is——"That he recover his seisin of the said messuages with the appurtenances, and nothing by amercement of the said A, because he came on the first day, according to the summons &c." if the confession be upon the original.

Damages and Costs, none at common law.

7. And Note, That in no real actions the demandant did recover costs or damages at common law, *i. e.* in purely real, for in some mixt actions he did, as in assise, writs of entry in nature of an assise, in attaint. *vid. Co.* 2 *Inst.* 286. *Co. lib.* 10. *Pilford's* case, 116. 3 *H.* 4. 16.

Stat. Gloc. c. 1. firſt ſtat. which gave damages. Except ſtat Merton c. 1.

8. The statute of *Glocester*, *c.* 1. in the 6 *E.* 1. was the first statute (except the statute of *Merton c.* 1. which gave damages in dower *unde nihil habet*) that gave damages and costs in real actions. *viz.* in these particularly——1. In a writ of *cosinage*, 2. *Ayle*, 3. *Besayel.* 4. A writ of entry *sur disseisin*, 5. *Assise de Mordancester.* 6. In all real actions grounded upon the intrusion, or *son tort demesne* of the tenant*.

Counts not to damages.

9. In real actions, the demandant never counts *ad damna*, but he shall recover damages pending the writ in such actions where damages are given. But a *Warrantia chartæ* is excepted out of this rule, for there the plaintiff did declare *ad damna*. 21 *E.* 3. 57. *b. Rast. Entr.* 396.

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Where a writ of inquiry ſhall be awarded

10. And because damages in some cases are recoverable *pendente breve* a writ of inquiry of damages shall be awarded: as in a writ of entry *sur disseisin*, the demandant shall recover damages from the disseisin to the time of the inquisition a-

* 1 Rev. Laws. 528.

warded, and not after, as *per* 33 *H.* 6. 47. *a.* In other *præcipe quod reddat*, damages shall be recovered from the disseisin or wrong done, &c. to the time of the judgment given, but if it be upon a verdict, but to the time of the verdict, if the court do stay judgment upon a *curia advisari vult*, *ibidem*, *quaere rationem*.

11. In a *præcipe* of a rent of the demandant's own possession, he shall recover the arrears pending the writ *usque diem judicii redditi*, because it is his inheritance. 33 *H.* 6. 47. 7 *E.* 4. 5. 40 *E.* 3. 24. 16 *H.* 7. 5. *a. b. Co. lib.* 10. *Pilford's* case. *Co.* 2. *Inst* 286. But 33 *H.* 6, 37. *b. semble contra*, so in assise of rent, *ibidem*. From what time damages are recoverable.

12. In real actions *Ancestrell droiturell*, as in writs of right, and writs of right in their nature, *viz. formedons*, *partitione facienda*, and all others (except dower *unde nihil habet*) no damages are recoverable at this day. *Co.* 2 *Inst.* 287, 289. 7 *H.* 6. 35, 36. 3 *H.* 4. 16. No damages recoverable in some actions at this day.

13. Note, that the reason my lord *Coke* gives in 2 *Inst.* 286. why the demandant in real actions should not recover damages at common law, is because the demandant never counted to damages, which (I conceive cannot be the reason, for in some mixt actions at common law, the demandant never counted to damages, as in assise, writs of entry, in nature of assise, and in attaint, and yet damages were recoverable in those actions, at common law; and in a *warrantia chartae* the demandant counts to damages, and yet shall recover no damages where the judgment is only *pro loco et* The reason why damages were not recoverable at Common Law.

In warrantia chartae, counts to damages, yet recovers none.

tempore i. e. where no land is lost. 40 *E.* 3. ¶ *Hob. Rep. Osborne's* case*.

(76) The writ of inquiry of damages.

The writ of inquiry of damages is thus——

"The king &c. to the sheriff greeting: we command you that by the oath of good and lawful men of your county, you diligently inquire how much one messuage &c. with the appurtenances in C whereof T unjustly, and without a judgment hath disseised W within &c. And which the said W in our court before our justices at Westminster recovered against him by default are worth by the year, in all its issues according to the true value, and how much time hath elapsed from the day of the said disseisin, and further what damages the said W hath sustained by reason of that disseisin. And certify to our justices at Westminster, on &c. the inquisition which you shall thereupon make under your seal and the seals of those by whose oath you shall make that inquisition. And have there the names of those by whose oaths you shall take that inquisition, and this writ &c." *Rast. Entr.* 278. *b.*

I conceive it not impertinent to say something in relation to the falsifying of a recovery, to shew how a judgment obtained in a real action may be avoided by plea, without a writ of error, or attaint, and the learning hereof, is not only useful in real actions, but contains much in it of the reason of

* A difference is well observed between personal actions and real actions in which damages are to be recovered for in personal actions they shall declare to damages, because they shall recovor damages only for the wrong done before the writ brought, and shall recover nò damages for any done pending the writ. But in real actions the demandant shall never count to damages because he is to recover damages pending the writ. Pilford's case 10 Rep. 113.

In real actions demandant shall not count to damages because it is uncertain to what the damages will amount, because he shall recover those pending the writ. ib.

the law in other cases, and with that I shall conclude this first book.

CHAPTER XXIV.

Of Falsifying a Recovery.

Recoveries may be falsified.

1. THOUGH judgments once had, are in law as sacred whilst they are in force, and bind the right not only of parties and privies, but also of all strangers whose titles are mesne to the title of the demandant and the judgment, yet if they are obtained by fraud or covin or other illegal way, and not warranted by the rules of law, in many cases they may be avoided and falsified by plea, if they be pleaded against him that has right.

How many ways they may be falsified.

1 by entry & plea.

2. They may be falsified several ways, 1. by entry and plea, 2. by action, 3. by action and plea, 4. by plea only. 1. By entry and plea, when the parties entry is not taken away by the recovery, and he brings an assise, and the recovery is pleaded against him, then he pleads matter to avoid the recovery, as if one be ousted by covin between the demandant and him that ousts the tenant, and then the demandant brings an action against him who ousted the tenant; the tenant may have an assise, and if this recovery be pleaded against him, he may avoid it for the reason aforefaid. 41. *Ass. Pl* 28. *Br Fauxif. Recovery.* 40. So if a woman that has title of dower, procure another to enter, and recover against him, this may be falsified in an assise. 44 *Ass.* 29. *Br. ibidem* 48. so tenant *per stat. Merchant, Staple, Elegit* may falsify for covin in an assise, 21 *E.* 3. 1. *Br. Fauxif. recovery* 48.

2. By action and plea.

2. By action and plea; and that is, when the entry of the party that has right is taken away by the recovery, and upon a real action brought, this

recovery is pleaded in barr of his right; this may be falsified by plea, as at common law, if a recovery were had against tenant for life, he in reversion could not, (nor yet can, save in common recoveries) falsify by entry as to have a common assise, but must falsify by plea in an *ad terminum qui praeteriit* or writ of right 24 *H.* 8. *Br* 44. So if before the statute of *uses* the *cestuy qued. use* in tail had suffered a recovery against him by feint title, the feoffees should falsify by way of action, and not in an assise by way of entry 31 *H.* 8. *Br. Faux. recovery* 49. So the issue in tail may falsify in a *formedon* 7 *H.* 4. 17. *Br. Faux recovery* 10.

3. By action. 3. By action, as in a *quod ei deforceat*, by particular tenants, and deceit for want of summons, *&c.* But these are not intended in this place, being particular actions of themselves treated of hereafter.

4. By plea only. 4. By plea only, as when the action is brought against the tenant upon a recovery, or a recovery is pleaded in the demandant's replication against him, then may the tenant falsify it, if he have cause. (78) As in a *scire facias* against the ter-tenant upon a recovery against B. the ter-tenant may falsify the recovery for good cause. 12 *E.* 4. 2. *Br. Faux. recovery* 31. So in trespass, the defendant pleads in barr, and the plaintiff in his replication pleads a recovery, the defendant by rejoinder may falsify. *Vid.* 12 *E.* 4. 14. & 19. 13 *E.* 4. 1. *Br. Faux. recovery* 30.

Several causes of falsifiing. 1. By covin. 3. There are several causes and grounds for the falsifying a recovery 1. For covin, *Br. Faux. recovery* 1. 3. 6. 27. 46. 2. An elder title of entry than the tenant had against whom the recovery was obtained, and upon whom the entry was made.

Br. Faux. recovery 2. 3. Want of jurisdiction in the court where judgment is given. *Br.* 9. 38. 4. Warranty and assets. *Br.* 18. 5. By reason of a release. *Br.* 21. 6. *Faint pleader* in the action wherein the recovery is had. *Br* 22. 49. 7. No tenant of freehold at the time of the recovery. *Br. Faux. recovery* 30. 32. 37. 8. Want of an estate in the tenant, as being but tenant for life. *Br.* 44.

1. For the first as to covin, as when he who has an advowson, and grants the next avoidance, and afterwards of covin to destroy the grantee's interest, he suffers a recovery by writ of right of advowson against him. 26 *H.* 8. 2. So if one pleads a recovery against himself by assise, *puis le darreine continuance*, the demandant may say, that this recovery was of covin, and must shew how, *i. e.* that the tenant did not disseise the tenant in the assise. 9 *H.* 6. 41. So if the entry of one that has right to land be taken away, and he of covin gets another to enter, and recovers against him, this may be falsified for covin, though the party that recovered had a good title, and he who was ousted may either enter, or bring an assise: and where a woman has title of dower, and gets another to enter, and then recovers against him that entered, this may be falsified for the covin. 9 *H.* 6. 41. and other cases there are of the like nature. 7 *H.* 4. 19. 5 *H.* 7. 40*. 1. For covin.

2. As to the second ground of falsifying. If A bring a *precipe quod reddat* against C and recover against him, and hanging the *precipe quod reddat* L Enters, and A brings a *scire facias* against 2. An elder title of entry.

* If the recovery was by covin or consent, by Stat. 32 H. 8. 31. & 14. Eliz. 8. (1 R. L. 527 8.) it will be a forfeiture, and he in reversion or remainder may enter for the forfeiture. Co Lit. 362. a.

him, and in plea to the *scire facias*, he makes a title, and says that he was seised till C disseised him against whom the recovery was had, this is good to falsify the recovery, because L had elder and better title to the possession than C had, against whom the recovery was obtained after his title was avoided by entry. 3 *H.* 6. 34.

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3. Want of jurisdiction.

3. As to the third, for want of jurisdiction: As if one plead a recovery in a base court in ancient demesne, the other party may falsify this, by shewing how the land is *(Frankfee)* by virtue of a fine levied in the king's courts, &c. 7 *H.* 4. 3. The like see 39 *Assise. pl.* 6.

4. Warranty & assets.

4. The fourth ground as to warranty and assets: If a tenant in tail discontinue with warranty, and assets is descended, and the issue in tail procures another to enter, and recovers against him, the alienee may falsify this recovery by the warranty and assets; and in this case there is covin, as well as the warranty and assets to avoid this recovery. 27 *Assise. pl.* 74.

5. A release.

5. A release may be a fifth cause, as when in an assise, a recovery is pleaded against B in a *scire facias* to execute a fine, and that the plaintiff's title is mean between the fine and the execution; the plaintiff may reply and falsify the judgment for execution, because he against whom the recovery was had, was but tenant for life, and that the ancestor of him who recovered, released his right to the ter-tenant before execution, and so the execution falls in law. 29 *Assise. pl.* 1. *Br. Fauxif. de recovery*, 21.

6. Faint pleader.

6. The sixth ground in case of faint pleader, as if *cestuy que use* before the statute, suffer a recovery against him upon a faint title, the feoffees shall falsify. *Br. Faux. recovery* 49. So if a man has a

warranty and does not plead it against the party himself who recovers. 30 *Assise. pl.* 10.

7. The seventh ground that there was no tenant of the freehold. As if a recovery by writ of right be pleaded against the issue in tail and a voucher, &c. it may be falsified so as to plead, that at the time of the writ brought, the tenant was not the tenant of the freehold, nor at any time after, 12 *E.* 4. 14, 19. 13 *E.* 4, 1. *Vid.* 14 *E.* 4. 2. He need not shew who was tenant, if the recovery was by default, but only to plead *non tenure* generally. The like see 19 *Ass. pl.* 4. So if the tenant was not seis'd of the estate tail at the time of the recovery. *Kelw. rep.* 136. *b. Pl. com. Manxill's case,* 8. (80) 7. No tenant to the Precipe.

8. As to the last ground where the tenant has but a particular estate, he in reversion may falsify it in another action: As if a recovery be against tenant for life, he in reversion may falsify in *ad terminum qui præteriit;* but if tenant for life pray aid of a stranger, he in reversion may enter before judgment, but after judgment he cannot enter, but must falsify, as before. *Br. Faux. rec.* 44. The statute of 14 *Eliz. c.* 8. which makes recoveries void by or against tenant for life, extends only to recoveries by covin or consent, *i. e.* to all common recoveries. 8. Want of estate in the tenant.

4. *Vid. Stat.* of 21 *H.* 8. *c.* 15. How termors for years, tenants by stat. merchant, staple, *Eligit,* shall falsify fained recoveries by them in reversion, &c. *Co. Lit.* 104. *b. Co. Lit.* 46.* Termors for years may falsify & tenant per ſtat. merch. per ſtat 21 H. 8. c. 15.

5. Observe these six rules as to falsifying recoveries. 1. No party nor privy to a recovery, shall falsify in the point tried by verdict; as if an issue be tried against a tenant in tail upon the title, *i. e.* (*non* Rules of falsifying recoveries. 1: Not to falsify in point tried by privies:

* 1 Rev. Laws, 528.

dedit) he, nor his issue, shall falsify in this point, but must have an attaint, otherwise if the recovery were by default, or issue upon a collateral point, and not upon the title. 34 *H.* 6. 2. 19 *H.* 6. 39.

2. Where he may falsify in the point tried.

2. Where a man cannot have an attaint, he may in some cases falsify in the point tried; as if a man seis'd in *Borough English*, lose by false oath, the attaint belongs to the eldest son; and therefore the younger may falsify in the point tried, *per Fortescue.* 22 *H.* 6. 28. and 26 *H.* 6. 18.

3. A ſtranger may falſify in the point tried.

3. A stranger may falsify a recovery in the point tried, or by any other matter which proves the recovery void, or the title of the demandant to be void; as in assise, if a recovery be pleaded against N and plaintiff's possession mean between the title and the writ brought, this recovery may be falsified by alledging a release, which the tenant in the recovery might have pleaded, or he may plead, that the tenant died hanging the writ, or that the tenant had nothing in the land hanging the writ, &c. 36 *H.* 6. 32. 9 *H* 6. 41. *Br. Faux. rec.* 3. 15. But it's said, a stranger cannot falsify in dilatories; as to say, a feme demandant took husband pending the writ. *Br.* 15. 36. *H.* 6. 32. Nor that the action was discontinued, nor to alledge any error in the record. 21 *E.* 4. 23. *Br.* 34.

4 None can falſify without title.

4. None can falsify (though he be a stranger) without making a title. 36. *H.* 6. 32.

5 Cannot falſify out of time.

5. Where a man loses his advantage of time to falsify, he shall not falsify afterwards: As if an assise be brought against B and he pleads a recovery, and the plaintiff hath cause to falsify it, and does not but pleads another matter which goes against him, and judgment against him, he cannot falsify after in another action. 40 *Ass. pl.* 4. *Br. Faux. rec.* 39.

6. He who claims under him who suffers the recovery, or against whom the recovery is had, cannot falsify, though he be a stranger; as if one purchase of the tenant, hanging the writ, and after the demandant recovers, the purchaser is bound by the recovery, and cannot falsify. 36 *H.* 6. 32. *Br.* 15. 14. *Ass. pl.* 26. *Br.* 42.*

6. He who claims under him who loſt cannot falſify.

* 1 R. L. 525. § 1, 3, 6, 9 & 10, as to falsifying recoveries.

OF

PARTICULAR

REAL ACTIONS

IN GENERAL.

BOOK II.

CHAPTER I.

In what cases to be brought.

1. WHERE a man had right or title to any lands or tenements, and the possession thereof was unjustly taken or withheld from him that had right, the common law and statute law did provide several remedies for the recovery of the possession according to the several circumstances of the difference of the case; and the several remedies had their several names and denominations commonly from the most important point of the writ, or matter therein mentioned to be redressed or complained of, as the writ of *ayel* from the seizin of the grand-father; the *mordanecster* from the death of the ancester, though he died not seised, if he were seised the day of his death. *F. N. B.* 486. The writ of right, so called because the words in the writ are, "that without delay you do full right, &c." *Co.* 1. *Inst.* 115. *a.* and so of others.

Denominations from the point of the writ.

2. These real writs do admit of divisions and sub-divisions; sometimes they are divided in respect of the words of the writs; and so they are divided into 1. *Precipe quod reddats.* 2. *Precipe quod faciats* for things not in render, as the writ *de consuetudinibus et servitiis, secta ad molendinum, quod permittat.* 3. Or, *si fecerit te securum. Finch. Law* 257. 2ly. They are divided in respect of the person that was last seised, into actions possessory and actions ancestrel. The kinds. (83)

Possessory are those that are brought when the demandant himself was seised; as in assises, writs of entry in nature of an assise, writ of right of a deforcement to the demandant, escheat, *cessavit*, writ of right *sur disclamer*, &c. Possessory actions.

Ancestrel are those that are brought upon the seisin of the ancestor, as *mordantcester*, *ayle*, *besayel*, *cosinage*; and these actions *ancestrel* are again subdivided into actions *ancestrel possessory*, as where the immediate ancestor was seised, and the possession descended to the next heir; and into *ancestrel droiturel*, where nothing but a bare right descended from the ancestor; and are likewise sometimes for the mere right, as the writ of right, and sometimes grounded upon the right, as writs of right in their nature, some writs of entry, as *dum fuit infra ætatem*, *non compos mentis*, *Co. lib.* 6. *f.* 3, 4. *Markal's case.* Actions ancestrel.

3. Regularly, all *præcipe quod reddats* real, are either, 1. Writs of right, as a *præcipe in capite.* 2. Writs of right in their nature. 3. Writs of entry. 4. Writs of seisin of the grand-father and great-grand-father, as *ayel* and *besayel*, or of the great-grand-father's father, or of the brother of the great-grand-father's father, called a writ of cozinage. Another division.

Division of writs, Si fecerit te securum, &c.

4. The real writs of *si fecerit te securum, &c.* are such as are either of the demandant's own seisin; as an *assise de novel disseisin*: or 2. of the seisin of his ancestor, being his father, mother, brother, sister, uncle, aunt, nephew or neice, as an assise of *mordantcester*, or any other ancestor where the writ is brought by privies in blood, as the *nuper obiit*. 3. *A quo jure*, which is a writ of right in its nature. 4. *Partitione facienda*. 5. *Juris utrum, attaint*.

Division of præcipe quod faciats.

5. The real *præcipe quod faciats* whether they be for things in fesans of sufferance, are either to recover hereditaments not being land, or some real thing concerning them; of the first sort are the writ *de consuetudinibus et servitiis, secta ad molendinum, quare impedit, quod permittat;* of the second sort are the *curia claudenda*, a writ of covenant real to levy a fine, a writ of *mesne, warrantia cartæ*. Under these divisions lie all, or most of the considerable real writs, some of which likewise are divisible again, under their proper heads, as the writs of right, and writs of entry, which shall be taken notice of, when we come to those particular actions.

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Real actions may be brought tho' the entry be not taken away

6. Note for a rule, that anciently (and at this day) a man might bring a real action, yea, a writ of right (if he pleased) though his entry was not taken away. And generally where the entry is not taken away, the *assise* of *novel disseisin* was the common remedy to recover the possesion, as the *ejectione firmæ*, is at this day. *Co.* 1 *Inst.* 278. 6. *Lit. Sect.* 478.

Where a man may have election to have several sorts of actions.

7. In most cases where a man may have a real *præcipe*, he may have a writ of right, which is the highest real action; but in some case, if he do bring a writ of right when he may enter, he loses the land forever. As if a disseisor within age alien, and the alienee die seised, and his heir enter, and the diseasee

release his right to the heir of the alianee, in this case the disseisor has a right to the possession, because he alienedunder age, and therefore may enter, but if he bring a writ of right against the heir of the alianee, he loses the land, because the heir of the alienee has the more ancient right in him by the release, but if he had entered, the heir of the alienee should not have recovered in a writ of right, against him, because a bare right in such case shall not be left in the heir of the alienee, but shall ever follow the possession. *Co. 2 Inst. 279. e. f. 266. a.*

CHAPTER II. (85)

Of a Writ of Right in general.

Writ of right, what.

1. A Writ of right, (properly so called) is a writ brought by him who has the full and meer right of property to the land in him, to recover the right of possession, which he cannot be restored unto without a judgment first had for him in the king's court, or some court baron. *Bract. lib. 5. tract. 1. c. 1**.

Wherein different from others.

2. And though this definition may be applied to many other actions where the entry of the demandant is taken away, yet this writ differs from all others. 1. In the frame of it. 2. In the use of it. 3. In the process and proceedings. 4. In the end of it.

In the frame of it.

1. First from the frame of it, it is always directed to the lord of whom the land is holden, to do right to the demandant in his court, and remains with the demandant, except where the lord remits his court to the king, or has no court, there the writ is directed to the sheriff, or in the case of

* A claimant in fee simple, may have a meer writ of right, which is in its nature the higheſt writ in the law, and lieth only of an eſtate in fee ſimple and not for him who hath a leſs eſtate. 3 Comm. 193.

the king, where the land is holden of him, as of some honor, castle, manor, or in *capite*, as of his crown; in the first case, the writ is directed to his bailiffs, and in the other to the sheriff, which is called a *precipe in capite*. *F. N. B.* 9. *register original* 1, 2, 3, 4. Where it is directed to the lord or king's bailiffs, there are these words always in the writ. We command you that without delay you do full right to W B of one messuage, &c.

In the use of it.

2. For the use of it in some case, no other writ can be had but a writ of right for recovering of the possession; as in all or most cases where a man loses land by default in a *precipe quod reddat:* but in 11. *Ass.* 17. *Br. Droit de recto.* 23, after a recovery against an heir by default, where his ancester died seised, the heir brought a *mordancester* and good. *Quere*, whether there be any other case.

(86)

2. Where the tenant loses in *precipe quod reddat*, by action tried. 3. Where the demandant is barred in any other real action (though it be but by action tried) he shall have a writ of right, as his *ultimum refugium*. 4. If a man lose by default in a writ of right before the *mise* joined, he may have a writ of right against him that recovered. *F. N. B. ibidem.* 5. I conceive it is then proper for this action, when the seisin of the ancestor is not within the time of limitation prescribed to other actions.

In process and proceedings.

3. It differs from other original real writs in the process and proceedings, of which more hereafter.

In the end.

4. In the end of it, for it is ordained to be the utmost remedy that any man may have in civil actions for the recovery of possessions, that there

may be an end of suits; for the judgment is commonly final, and as *Fleta* says, *lib.* 6. *c.* 1. *Actio quidem super recto ultimum locum sibi vendicat in ordine placitorum a summo remedio ad inferiorem actionem, non habetur ingressus nequi auxilium.*

3. Writs of right are of several sorts——As the writ of right patent, writs of right close, and writ of right of *London*, which are the proper writs of right, and writs which are writs of right in their own nature. Kinds of writs of right.

Writs of right proper and in their nature are:

1. *Writ of right patent.*
2. De Recto quando dominus remisit Curiam, *is close.*
3. Præcipe in capite, *is a writ of right close.*
4. *The little writ of right close in antient demesne.*
5. *A writ of right of dower is patent.*
6. *A writ of right of* London.
7. *Writ of right* de rationabili parte.
8. Ne injuste vexes, *is a writ of right patent in its nature.*
9. *A writ of right of advowson.*
10. A nativo habendo *in its nature, a writ of right.*
11. Quo jure, *in its nature a writ of right.*
12. De rationabilibus divisis, *in its nature is a writ of right.* 5 *E.* 4. 2. *b.*
13. *A writ of right* de custodia terrarum & hæredum.
14. De consuetudinibus & servitiis, *a writ of right in its nature.*
15. *A writ of right* sur disclaimer.
16. *All* Formedons *are writs of right in their nature.* Co. lib. 6. 7. c. 8.
17. Cessavit, *a writ of right in its nature.*
18. *A writ of dower* unde nihil habet, *in its nature, a writ of right.*

CHAPTER III.

Of A Writ of Right Patent.

1. THERE are several sorts of writs of right patent, as first, the general writ of right patent directed to the bailiffs of the king when the land is holden of him as of some manor, &c. or to the lord of whom the land is holden, and this is the highest writ of right patent. *F. N. B.* 1. 2. 2. The writ of right in *London*. 3. The writ of right of dower. 4. The writ of right *de rationabili parte*. 5. The *ne injuste vexes*. *Reg.* 1, 2, 3, 4*. What.

2. The general writ of right, chiefly intended to be treated of in this chapter is called in books *(droit droit)* because it hath the greatest respect, and the most assured judgment. And this is not to be understood strictly of a writ of right patent only, but likewise of such writs of right as are of the same nature, and do as it were flow from it, as the writ of right *quia dominus remisit curiam*, which is close, and is nothing but the writ of right patent brought in the king's court, and then it is always close, and directed to the sheriff; and the writ called the *precipe in capite*, which is as high a writ of right as any, and is where the land is holden of the king, as of his crown, and not as of any manor or honors, &c. and this is always close and directed to the sheriff. *Register Brev.* 4. *b. F. N. B.* 11. Droit, droit. (88)

3. All other writs of right, are writs of right in their nature only; and I conceive they are called writs of right in their nature, partly for distinction sake, to difference them from the proper writ of Writs of right in their nature why so called

* A writ of right properly so called is either patent or close. When it is directed to the lord of whom the lands are holden, it is patent, to do right in his court. F. N. B. 1 F. But it shall be close when it is for lands in capite by precipe in capite &c. ib.

right for lands in fee-simple, and partly because in most of their process and proceedings they agree with the writ of right, but not in all, and that the estate thereby demanded, and to be recovered, is not always the meer right, *i. e.* the fee-simple; as the *writ of right of dower*, *formedon in descender*, *remainder;* and some of them are not for lands, but some particular hereditaments, as the *writ of right of advowson*, *writ of right of ward*, *de consuetudinibus & servitiis*, and the like*.

To whom the writ is to be directed.

4. Where the lands are holden of a common person, the original writ of right patent is always directed to the lord of the manor, if he be in *England*, otherwise to his bailiff; but the writ is always to remain with the demandant himself, so doth no other original.

The Original is thus——

The writ.

"*Charles*, &c. to T M greeting: We command you, that without delay you do full right to T B of one messuage and ten acres of land with the appurtenances in B which he claims to hold of you by the free service of one penney *per annum* for all service; of which J S deforceth him; and unless you will do this, let the sheriff of C do it, that we may hear no more clamor thereupon for want of right. Witness, &c." *Reg. f.* 1. *a.*

How the writ is to be delivered.

5. The original thus sued forth, it ought to be brought to the steward of the court of the manor, of which the land is holden, and there delivered in court to him; upon which after he hath given pledges to prosecute, and the steward hath made

* "There are alſo ſome other writs which are ſaid to be in the nature of a writ of right, becauſe their proceſs and proceedings do moſtly (though not entirely) agree with the writ of right: but in ſome of them the fee ſimple is not demanded; and in others not land, but ſome incorporeal hereditaments." 3 Comm. 194.

an entry of the demand by the writ, he ought to deliver the writ again to the demandant.

The entry of the writ of the court baron is thus— (89)
At the court of D knight of his manor of S held there before J S seneschal, or J B and J T the bailiffs' of said D, and J N and L T &c. Suitors of that court on the day &c.

Record en Court Baron.

" At this court comes J M in his proper person, bringing with him the writ of right patent of our lord the king, which follows in these words, to wit: The king &c. and prays that full right be done to him the said J M, against the said J L, of the manor and tenements aforesaid, according to the exigency of the said writ, and he hath found pledges for the prosecution of the said writ, against the said J L, to wit, A and B. And it is commanded J S the bailiff, that he summon the said J L to be at the next court &c. there to be held to answer the same J M, of a plea that he render unto him, the manor and tenements aforesaid, with the appurtenances, which the same J M claims as his right, against the same J L, by the writ aforesaid." *Rast. Entr. 244. b.*

Tolt.

6. If the bailiff or steward delay the demandant, and will not send out process, then the demandant may remove the plea into the county court by a precept called a *tolt*, and then the entry in the court baron is further thus——

Record of the Tolt.

" And because the said bailiffs favour the said J L against the said J M, so that the said summons of the said J M is not yet permitted to be made, but day is given to the same J M, until the next court, &c. here to wit, on Wednesday next, &c. to be held, &c. at which day, before the said bailiffs and suitors of the said court, comes the said J M in his proper

person. And the sheriff of the county of C, by his bailiff, and by the bailiff of our lord the king, by virtue of a certain precept of the said sheriff, shewn here in court, setting forth, that from the complaint of the said J M, full right is not done him in the plea aforesaid, by the said bailiffs in this court hath removed the said plaint to bring it into his county court of N, &c.

The Tolt is thus——

The writ called the Tolt.

"Robert A sheriff of Norfolk, to Edmund C the lord the king's bailiff of his dutchy of Lancaster of F, greeting: Because I have received information from the complaint of John B, personally appearing at my county court, (to wit,) on Monday next after, &c. in the year &c. held in the shire-house at Norwich, that although he brought to J P and J B bailiffs (of the said lord the king of the dutchy aforesaid) of F aforesaid, the lord the king's writ of right patent directed to the bailiffs of the said lord the king, of his dutchy of Lancaster of F in my said county, for the purpose that they might do full right to the said
(90) John B of the manor of F with the appurtenances, whereof John S deforceth him; yet because the said bailiffs favour the said J S in that matter, and have hitherto delayed to do full right according to the exigency of the same writ, I command you, on behalf of the lord the king, firmly enjoining you that you go in your proper person to the lord the king's court of his dutchy aforesaid of F and remove the plaint which is there between the said John B and John S by the said writ into my county court next to be held, and summon by good summoners the aforesaid John S that he be at my county court of Norfolk, to be held on Monday next coming, at N in the shire-house, to answer the aforesaid John B thereupon; and have you there the aforesaid plaint, the summoners and this precept. Given in my county court at Norwich in

the shire-house, on Monday next after, &c. in the year aforesaid." *F. N. B.* 3. *b.*

Then the return of the tolt is made upon the back of the tolt "by virtue of this precept, on the day &c. in the year &c. I went in my proper person to the court, within written held at B &c." *Vid. Rast, Entr.* 244. *b.* Return of the Tolt.

7. Upon the return of the plea into the county court, the demandant may remove the same out of the county, into the *common pleas*, by a writ called a *pone*, without any cause shewed in the writ, but if the tenant remove it, he must shew some cause in the *pone*. *F. N. B.* 9 *Rast. Entr.* 245. *a.* But there are other causes for which the tenant may remove the plea out of the lords court, or the county court into the *common pleas*. *Vid. F. N. B.* 10. *b.* Pone.

The pone *is as followeth*——

"The king, &c. to the sheriff of Lincoln, &c. Upon the petition of I M, put before our justices at Westminster, the plea which is in your county by our writ of right, between I M demandant, and I L tenant, of the manor of F, with the appurtenances in D, and summon by good summoners the aforesaid I L that he be then there to answer the aforesaid I M thereupon: and have you there the summoners, and this writ." *F. N. B.* 69. *m. Rast. Entr.* 245. *a.* Writ of Pone.

8. We have brought the writ of right out of the lord's court into the county, and from thence into the *comman pleas*, by the demandant by a *pone*; which, as is said, is the only proper way for the demandant, but the tenant he may remove it by a *recordari*, into the *common pleas*, immediately with cause shewed. *Vid. F. N. B.* The form of the *recordari.* Recordari.

Quia dominus remisit cur'

9. But without all this circuity the demandant may if he please, have his writ of right immediately returnable into the *common pleas*, which is most safe and usual. And in this case after the *teste*, there must be these words in the writ, viz. *Quia I. T. do minus feodi illius nobis inde remisit curiam suam* and if these words be in, it is not material whether the lord gives licence or not, but if they be not in it is sufficient if the lord send his licence to the king in the *chancery* afterwards. *F. N. B. 5. a.* And this writ of right is called *quia dominus remisit curiam* and is close directed to the sheriff.

Letter of Licence.

The form of the letter of licence from the lord, *vid. Rastall*, 246. *a.*

The original writ of right, quia dominus, *&c. is thus:*

The writ of Quia dominus remisit, etc.

"The king to the sheriff, &c. command A that justly, &c. he render to C one messuage with the appurtenances in M which he claims to be his right and inheritance, and whereof he complains, that the aforesaid A hath unjustly deforced him, and unless he will do this, and the aforesaid C shall give you security to prosecute his suit, then summon by good summoners the aforesaid A that he be before our justices at *Westminster*, on the fifteenth day of the holy trinity, to shew why he will not do it: And have you there the summoners and this writ. Witness, &c. Because I, the chief lord of the fee, hath thereupon remitted to us his court." *F. N. B. 2. b.*

(92)

Returned thus:——

Pledges to prosecute { *Henry Doe* / *Peter Poe.*

Summoners { *Richard Roe* / *David Doe.*

Hugh Cholmondely, knt. sheriff of Chester.

10. After the suing out of the original, the next thing to be done is to get the tenant summoned, and there ought to be 15 days at the least between the *teste* and the return of the original.* 15 Days Writ of Summons.

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* Proceedings in a *writ of right patent* between Tyffen, Esq. demandant, and Clarke, tenant.

George the Third, by the grace of God of *Great Britain*, *France* and *Ireland* King, defender of the faith, &c. to the sheriff of *Middlesex* greeting, command *George Clarke*, that he justly, and without delay, render unto *Francis John Tyffen*, Esq. *ten messuages, ten gardens, one shop, two coachhouses, three stables, and two acres of land, with the appurtenances, in the parish of Saint John Hackney*, which he claims to be his right and inheritance and to hold of us in chief, and whereof he complains that the said *George Clarke* unjustly deforces him, and unless he shall so do, and if the said *Francis John* shall give you security of prosecuting his claim, then summon by good summoners the said *George Clarke* that he appear before our justices at *Westminster in eight days of Saint Hilary*, to shew wherefore he hath not done it, and have you there the summoners and this writ. Witness ourself at *Westminster*, the twentieth day of *November*, in the twelfth year of our reign. The original writ of right.

Allot.

Pledges to prosecute, { *John Doe*, and *Richard Roe*. } The return indorsed on the writ of right.

The summoners of the within-named *George Clarke* are *James Armstrong* and *David Simson*.

And at the most usual door of the parish church of *Saint John Hackney* within mentioned, on *Sunday* the 29th day of *December*, in the year within written, immediately after divine service and sermon ended, I did cause public proclamation to be made according to the form of the statute in such case made and provided.

The answer of { *John Wilkes*, Esq. and *Fred. Bull*, Esq. } Sheriffs.

George Clarke, the tenant, having been legally summoned, did not appear at the return of the original writ, but

Manner of Summons.

11. The manner of the summons is as in other real actions upon the land, for which *vid. summons antea. f.* 3.

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made default, thereupon a writ of *grand cape* iſſued, the tenor whereof here follows:

The writ of grand cape.

George the Third, by the grace of God of *Great Britain*, *France* and *Ireland* King, defender of the faith, &c. to the ſheriff of *Middleſex* greeting. Take into our hands by the view of honeſt and lawful men of your county, *ten meſſuages, ten gardens, one ſhop, two coach-houſes, three ſtables, and two acres of land, with the appurtenances, in the parish of Saint John Hackney*, which *Francis John Tyſſen*, Eſq. in our court before our juſtices at *Weſtminſter*, claims to be his right and inheritance, and to hold of us in chief, and whereof he complains that *George Clarke* unjuſtly deforces him, by our *writ of right*, through the default of the ſaid *George Clarke;* and the day of the caption make known to our juſtices at *Weſtminſter* by your letters ſealed, and ſummon by good ſummoners the ſaid *George Clarke* that he be before our juſtices at *Weſtminſter from the day of Eaſter in fifteen days*, thereof to anſwer and to ſhew wherefore he was not in our court before our juſtices at *Weſtminſter in eight days of Saint Hilary* laſt paſt, as he was ſummoned, and have you there the names of thoſe by whoſe view you ſhall have done this, the ſummoners and this writ; witneſs Sir *William de Grey*, Knt. at *Weſtminſter*, the 12th day of *February*, in the twelfth year of our reign.

The tenant having appeared and ſaved his default at the return of the writ of *grand cape*, the demandant declared, and the tenant pleaded the general iſſue; whereupon, the *miſe* being joined upon the *mere right*, the following *writ of ſummons* iſſued to ſummon four knights to make *election* of the *grand aſſiſe*.

Writs of ſummons of four knights to elect the grand aſſiſe.

George the Third, by the grace of God of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. to the ſheriff of *Middleſex* greeting, we command you that by good ſummoners you ſummon four lawful knights of your county, girt with ſwords, that they be before our juſtices at *Weſtminſter*, *on the morrow of All-ſouls*, to make election of our *grand aſſiſe* between *Francis John Tyſſen*, Eſq. de-

12. Upon summons returned, if the tenant do not appear at the day of appearance, which at *Westminster* is the 4th day after the return of the writ, but in *Chester* the very return of the writ, the de-

When is the day of appearance at Weſtminſter; when at Cheſter.

Grand Cape.

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mandant, and *George Clarke*, tenant, of *ten meſſuages, ten gardens, one ſhop, two coach-houſes, three ſtables, and two acres of land, with the appurtenances, in the parish of Saint John Hackney* in your county, whereof the ſaid *George Clarke* in our ſame court hath put himſelf upon our *grand aſſiſe*, by praying a recognition to be made whether he hath a greater title to hold the tenements aforeſaid, with the appurtenances, *to him and his heirs* as tenants thereof, as he now holds the ſame, or whether the ſaid *Francis John Tyſſen* hath title to hold the ſame tenements, with the appurtenances, as he hath demanded the ſame, and have you there the names of the ſummoners, the knights, and this writ; witneſs Sir *William de Grey*, Knt. at *Weſtminſter*, the 30th day of *June*, in the thirteenth year of our reign.

Willes.

The ſheriff having done nothing upon the writ of ſummons of four knights, the following *alias writ of ſummons* iſſued, returnable *from the day of Saint Martin in fifteen days.*

The alias writ of ſummons of four knights.

George the Third, by the grace of God of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. to the ſheriff of *Middleſex* greeting, we command you, as before we have commanded you, that by good ſummoners you ſummon four lawful knights, &c. (as in the firſt writ of ſummons *verbatim*) witneſs Sir *William de Grey*, Knt. at *Weſtminſter*, the 6th day of *November*, in the fourteenth year of our reign.

Willes.

The return of the alias writ of ſummons of four knights.

By virtue of this writ to me directed, I have cauſed *James Eſdaile*, *James Hodges*, *Philip Dyot*, and *George Mercer*, four lawful knights of my county, girt with ſwords, to be ſummoned by *Henry Farguſon* and *Whittaker*, my baliffs, to be before his majeſty's juſtices at the day and place within mentioned, to do as by this writ they are required, and as I am within commanded, the ſaid ſum-

mandant may have a *grand cape*, upon the return of which, if the tenant do not appear and plead something to excuse his default the land is lost. *Vid. saver default, fol.* 29. *Vid. grand cape f.* 26.

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moners are and each of them is *mainpriſed* by *John Doe* and *Richard Roe*.

The anſwer of { *Stephen Sayer*, Eſq. and *William Lee*, Eſq. } Sheriffs.

The four knights above mentioned appeared in court, at the return of the *alias writ of ſummons*; and, being placed in the jury-box on the north ſide of the *court of the bench*, were ſeverally ſworn lawfully and truly to chooſe twelve knights, girt with ſwords, of themſelves and others, which beſt know and well declare or ſay the truth between the parties.

Booth 97. The four knights having choſen of themſelves and others *twenty-four*, a writ of *venire facias* iſſued, the *tenor* whereof here followeth:

The writ of venire facias. *George* the Third, by the grace of God of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. to the ſheriff of *Middleſex* greeting, we command you that you cauſe to come before our juſtices at *Weſtminſter, from the day of Eaſter in one month, James Eſdaile* of *Bunhill-row*, *James Hodges* of *High-gate*, *Philip Dyot* of *Dyot-ſtreet*, *George Mercer* of *Margaret-ſtreet*, *John Walford* of *Bunhill-row*, *Edward Hawkins* of *Lemon-ſtreet*, Knts. *John Spiller*, of *Chriſts-church*, *Gerrard Howard* of *Hampſtead*, *Robert Cary* of the ſame, *Guy Bryan of Chriſt-church*, *Cadwallader Coker*, *of Old-ſtreet*, *Roger Griffin* of *Iſlington-road*, *Joſeph Keeling* of *Clerkenwell*, *Thomas Cogan* of *Iſlington*, *Lomax Ryder* of *Finchley*, *William Addington* of *Southampton-row*, *Thomas Parry* of *Berner's-Street*, *Charles Shepherd* of *Bulſtrode-ſtreet*, *Thomas Lockwood* of *Edward-ſtreet*, *George Reed* of *Liſſon-green*, *Harry Parker* of *Newman-ſtreet*, *William Baker* of *Portman-ſquare*, *Joſeph Wilton* of *Queen-ann-ſtreet*, and *Leonard Morſe* of the ſame Eſqrs. recognitors choſen to make recognition of our *grand aſſiſe*, between *Francis John Tyſſen*, Eſq. demandant, and *George Clarke*, tenant, of *ten meſſuages*, *ten gardens*, *one ſhop*, *two*

13. The fourth day after the return, the tenant may essoin, and this at *Westminster* delays the demandant several weeks, as if the essoin be cast *tres Michaelis*. It shall be adjourned by the demandant 15 days, at least to *crastina animarum* which is from Essoin.

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coach-houses, three stables, and two acres of land, with the appurtenances, in the parish of Saint John Hackney in your county, whereof the said *George Clarke* in our same court hath put himself upon our *grand assise* by praying a recognition to be made, whether he hath a greater title to hold the tenements aforesaid, with the appurtenances, to him and his heirs as tenants thereof as he now holds the same, or whether the said *Francis John Tyssen* hath title to hold the same tenements with the appurtenances as he hath demanded the same, and have you there this writ; witness Sir *William de Grey* Knt. at *Westminster* the 12th day of *February* in the fourteenth year of our reign.

Here now follows the entry of the whole record upon the roll (number 489) among the *pleas of land* of *Trinity* term in the thirteenth year of king *George* the Third.

Middlesex, (to wit) *Francis John Tyssen*, Esq by *John Vernon* his attorney demands against *George Clarke ten messuages, ten gardens, one shop, two coach-houses, three stables, and two acre of land with the appurtenances, in the parish of Saint John Hackney*, as his right and inheritance by *writ* of the lord the king of *right*, and thereupon he saith that *Francis Tyssen*, Esq. father of him the said *Francis John*, was seised of the tenements aforesaid, with the appurtenances *in his demesne as of fee and right* in the time of peace in the time of the lord *George* the first, late king of *Great Britain*, (to wit) *within sixty years now last past*, by taking the *esplees* thereof to the value, &c. and from the said *Francis John, the father*, the *right* descended to the said *Francis John*, who now demands as son and heir of the said *Francis his father*, and that such is *his right* he offers &c. And the said *George Clarke*, by *John Swale* his attorney, comes and defends the right of the said *Francis John Tyssen*, and the seisin of the said *Francis Tyssen*, when, &c. and the whole, &c. and whatsoever, &c. and mostly of the tenements aforesaid, as *of fee and right*, &c. and The count upon a writ of right.

The defence. Hooth 93 sect. 23.

Essoine to be adjourned.

the 20th of October to the 3d of November, and so of other days according as the essoin is cast. Note, that the demandant must adjourn the essoin, otherwise he may be non-suited, if the tenant enter a

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The tenant concludes his plea to the grand assise.

he puts himself on the *grand assise* of our lord the king, and he prays a recognition to be made, whether he the said *George Clarke* has a greater title to hold the tenements aforesaid with the appurtenances *to him and his heirs* as tenants thereof as he now holds the same, or whether the said *Francis John Tyssen* has title to hold the same tenements with the appurtenances as he has above demanded the same, &c. and the said *Francis John Tyssen* doth the like: Therefore the sheriff is commanded that he summon by good summoners four lawful knights of his county girt with swords, that they be here *on the morrow of All-souls* next coming, to make election of *the assise* aforesaid; the same day is given to the parties aforesaid here, to hear the election of *the assise* aforesaid, &c. at which day here comes as well the said *Francis John Tyssen* as the said *George Clarke*, by their attorney's aforesaid, and the sheriff hath not sent the writ; therefore as before, the sheriff is commanded that he summon by good summoners four lawful knights of his county, girt with swords, that they be here *from the day of Saint Martin; in fifteen days* next coming, to make election of *the assise* aforesaid, the same day is given to the parties aforesaid here, to hear the election of *the assise* aforesaid, &c. at which day here come as well the said *Francis John Tyssen* as the said *George Clarke* by their attornies aforesaid, and the sheriff, (to wit) *Stephen Sayer*, Esq. and *William Lee*, Esq. now returns that *he* had caused to be summoned *James Esdaile*, *James Hodges*, *Philip Dyot*, and *George Mercer*, *four lawful knights* of his county girt with swords, by *Henry Farguson* and *John Whittaker* his bailiffs, to be here *from the day of Saint Martin in fifteen days* aforesaid, to do as the same writ commands and requires, and that the said summoners are and each of them is *mainprised* by *John Doe* and *Richard Roe*, whereupon the said *James Esdaile*, *James Hodges*, *Philip Dyot*, and *George Mercer*, four lawful knights of the county aforesaid, girt with swords, being called in their proper persons

Issue is joined upon the mere right.

Writ of summons of four knights to elect the grand assise.

Vicecomes non misit breve

Alias summons of four knights.

The return thereof.

The four knights appear and elect the grand assise.

ne recipiatur with the clerk of the essoins. But the essoin in *Chester* is but *de die in diem*.*

come, and being sworn upon their oath in the presence of the parties aforesaid, chose of themselves and others twenty-four (to wit) *James Esdaile, James Hodges, Philip Dyot, George Mercer, John Walford, Edward Hawkins*, knights, *John Spiller, Gerrard Howard, Robert Cary, Guy Bryan, Codwallader Coker, Roger Griffin, Joseph Keeling, Thomas Cogan, Lomax Ryder, William Addington, Thomas Parry, Charles Shepherd, Thomas Lockwood, George Reid, Harry Parker, William Baker, Joseph Wilton*, and *Geanaad Moase*, Esq. good and lawful men of the county aforesaid, who neither are of kin to the said Francis John Tyssen, nor to the said George Clarke, to make recognition of the grand assise aforesaid, therefore the sheriff is commanded that he cause them to come here on the octave of Saint Hillary to make the recognition aforesaid, the same day is given to the parties aforesaid here, &c. at which day here come as well the said Francis John Tyssen, as the said George Clarke by their attornies aforesaid, and the sheriff hath not sent the writ, therefore as before the sheriff is commanded that he cause them to come here, from the day of Easter in one month, to make the recognition aforesaid, the same day is given to the parties aforesaid here, &c. at which day here come as well the said Francis John Tyssen as the said George Clarke by their attornies aforesaid, and the recognitors of the assise, whereof mention is above made, being called come, and certain of them, (to wit) James Esdaile, James Hodges, Philip Dyot, George Mer-

Whereupon a venire facias is awarded.

The recognitors of the assize come,

* Tenant, to put demandant out of court, must enter a ne recipiatur, on the quarto die post, if the writ is not then returned. Cole. 91

" It is settled in Carthew, 173 Clobery, vs. the bishop of Exon, that the tenant, in a writ of right, is only demandable on the quarto die post; but that the demandant is liable to be called on the primo die placiti, and for non-appearance that his default may be entered; which, if he does not appear and excuse on the quarto die post, subjects him to a non-suit. Co. Litt. 139, b. At common law on every continuance or day given at or before judgment, the plaintiff or demandant might have been non-suited, and before the statute of 2 Henry 4. after verdict, if the court gave a day to be advised at that day the plaintiff was demandable, and therefore might have been non-suited, if he did not then appear; but that is remedied by our statute. After award to answer, however, or demurrer in law joined, plaintiff for not appearing shall still be non-suit, for he is not helped by the statute. Vide Cole. 128.

Where judgment shall be given without a grand cape.

14. At the day given by the essoin, if the tenant do not appear, judgment shall be given without a *grand cape*. *Vid. ante p.* 24. *Rast. Entr.* 146 *b.*

(93)

View when to be demanded.

15. If the tenant appear after the count, he may demand the view, and that delays the demandant nine returns more, *i. e* if he appear *crastina animarum* the 3d of Novemher, then the writ of view is returnable *quindena pasche* in Easter term, which is sometimes six months and upwards. *Vid. Stat.* 17 *Car. c.* 6. *Co.* 2 *Inst.* 567. *Dyer* 252. 9 *E.* 4. 18.

16. And view may be demanded either before or after an imparlance. *Rast. Ent.* 376. *a. vid. antea. f.* 44.

The writ of view in a writ of right:

Writ of view.

" The king, &c. to the sheriff of C greeting, we command you that without delay you cause &c. to have a view of one messuage, &c. in B which W in our court before our justices at Westminster, claims as his right against him by our writ of right, and says, &c. *Ut antea, f.* 44.

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cer, John Walford, knights, John Spiller; Gerrard Howard, Codwallador Coker, Roger Griffin, Joseph Keeling, Thomas Cogan, Lomax Ryder, William Addington, Thomas Parry, Charles Shepherd, and Thomas Lockwood, Esq. being elected, tried and sworn upon their oath say, that the said Francis John Tyssen, hath greater title to hold the said tenements with the appurtenances to him and his heir, as he above demandeth the same, then the said George Clarke, to hold the same as he now holdeth them, as the said Francis John Tyssen by his aforesaid writ hath supposed; therefore it is considered, that the said Francis John Tyssen recover his seisin against the said George Clarke of the tenements aforesaid, with the appurtenances, to hold to him and his heirs, quit of the said George Clarke and his heirs forever; and the said George Clarke in mercy, &c. 3 Wil. p. 558.

and being sworn goes a verdict for the demandant

Judgment that he do recover his seisin in fee.

Mercy.

For the return, *vid. f.* 46.

17. Upon return of the writ of view, the tenant may be essoined again, and that delays the demandant 15 days more at least. But Q. whether the essoin shall not be adjourned nine returns, as if the writ of view be returnable *quindena pasahe* in Easter term, and an essoin then cast whether they ought not to be given to *tres trinitatis*, which is some eight or nine weeks by the statute of 16 *Car. c*, 6. Tenant may be essoined upon return of the writ of view.

18. At the day given by the essoin after view, the tenant ought to appear, and then he may imparle, and day may be given to any common return day, or any other day in term, as the court shall think fit, for those days are but days *ex gratia curiæ vid. jour in court.* 52. 8 *E.* 4. 4. Imparlance after essoin.

19. And now we have brought the tenant to an appearance when the demandant has regularly prosecuted his action, but if the demandant have in any thing mistaken his proceedings, or hath not done in his process what by law he ought, he thereby gives the tenant an advantage to delay him much more, and it may be during his life, though he may prosecute his action several years. And in such case, the other learning of *Saver default*, *non tenure*, *several tenancy*, *joynt tenancy*, &c. comes to be of use, which see before. *p.* 29. 34. 37. 41. Demandant may be delayed by his own mismanagement.

20. After the tenant hath appeared, the demandant counts against him, which is commonly delivered to the tenant's attorney between the time of demanding the view, and the return of the writ of view. (94) Count.

Count in a writ of right.

Salop, ss. "R C, by I B his attorney, demands against I S, the manor of T with the appurtenances, Record.

and the advowson of the church of C, with the appurtenances, and two messuages, &c. in M, P, D, and E, as his right and inheritance by the writ of right of our lord the king; because the chief lord of the fee has remitted thereupon his court to the king, &c. And whereupon he saith that he himself was seised of the said manor, advowson, tenements and rents aforesaid, with the appurtenances in his demesne as of fee and right, and of the advowson aforesaid, as of fee and right in the time of peace, in the time of our now lord the king by taking the esplees thereof to the value &c. and that such is his right he offers, &c." *Rast. Entr.* 246. *a. b.*

This is a count where the demandant himself was seised, if it be of the seisin of his ancestor, the count must set forth, who, and in what king's time, *vid. Rast. Entr.* 104 *b.*

21. After the count (as is before said) the tenant may demand the view, and after view imparle.

Voucher aid.

22. After the view and imparlance, the tenant may plead or vouch, or pray in aid if he be tenant for life. For voucher, *Vid. antea. aid praier, antea Vid Co. Entr.* 1824. *b.*

Sed vide 2 Bac. & Pul. 388.

The entry of the defence in a writ of right.

23 The defence in this action is different from all others; for whereas in other *precipe, quod reddat*, the tenant defends his own right by saying, "comes and defends his right, when, &c," in this he defends the right and seisin of the demandant, saying, "and the said T comes and defends the right of the said S and his seisin, &c. and all &c. as of his fee and right and chiefly of the said tenements with the appurtenances." *Co. Entr.* 182. *a. b* Q*. the reason of this and the form of the replication seems as strange, the demandant saying that the tenant unjustly defends the right of the demandant thus, "and the said

But upon a confession, the tenant defends his own right. Rast. Entr. * 3 Black. Com. p. 296. Dublin ed this quere resolved.

S says that the said T unjustly defends the right of the said S and his seisin, &c. and all, &c. as of his fee and right, and chiefly of the said tenement with the appurtenances, &c. because he says, &c." and then recites the count again according to 21 *H.* 6. 26. *a. Co. Entr.* 182. *a.*

23. There are three sorts of trial in this action. 1. By the grand assise. 2. By battle. 3. By a common jury of 12 upon a collateral point. 3 Kinds of trial in a writ of right.

1. The grand assise is a jury of 12 joined to four knights, and chosen by them to try the mere right between the demandant and the tenant, upon whom the tenant hath put himself by pleading: And this is called joining the *(Mise)* upon the mere right, which in other actions is called *(joining issue.) Lit. Sect.* 514. *Co. Lit.* 294. *b.* 1. Gr. Assise.

Note, that the tenant in law, *i. e.* the vouchee or praiee in aid may put themselves upon the grand assise. *Co. Entr.* 181. *b.* 182. *a. b.*

It is called the *(mere right) merum jus*, because the right of property to the land is only tried and put to issue, without respect to the right of possession, for it is possible that the demandant or tenant may come unlawfully to the possession, and yet have good right to the land, and the grand assise shall find for them accordingly, as you may see. *Lit. Sect.* 478. In the case where an infant disseisor alieneth in fee, and the alienee dieth seised, and his heir enter, the disseisor being within age, if the disseisee release his right to the heir of the alienee, and then the disseisor bring a writ of right, and the *(Mise)* be joined upon the mere right, the grand assise ought to find for the tenant, for that the tenant hath the right of the disseisee, which is the antient right, though the possession of the tenant was not lawful, Mere right, why so called.

neither before nor after the release; but the disseisor might have entered upon the heir of the alienee, because he was under age at the time of the discent, and consequently might have had an *ejectio firmæ*. *Vid. Co.* 1 *Inst.* 279. *a.*

The pleading to the grand assise

(96)

23. The manner of the tenants' putting himself upon the grand assise is thus——"And the said E comes and defends the right of the said W (the demandant,) and his seisin, when, &c. and all, &c. and whatsoever, &c. and chiefly of the tenements aforesaid with the appurtenances; as of fee and right, &c. and puts himself upon the great assise of the lord the king, and prays recognition to be made, whether he has more right to hold the tenements aforesaid, with the appurtenances, to him and his heirs as tenants thereof, as he now holds them, or the said W, to have the said tenements with the appurtenances, as he above demandeth them, &c."

Mise joined in a writ of right without any replication.

Note, that upon the tenant's thus putting himself upon the grand assise, the *(Mise)* is joined without any replication by the demandant, and process awarded as hereafter is shewed. *Co. Entr.* 181. But yet the demandant may, if he will, imparle before the process be awarded, and if the tenant do not appear at the day given by the imparlance in the same term, this is a departure in despite of the court, and judgment shall be given against the tenant without a *petit cape*. *Rast. Entr.* 247. *Vid. antea departure in despite, &c. f.* 74 *Vid. Dyer* 98. *pl.* 51.

Summons to elect 4 knights.

24. When the *(Mise)* is joined and process awarded, first the demandant is to sue out a writ of summons, to warn four knights to appear, to chuse the grand assise, and this is a judicial writ in the *Register. f.* 51. And is thus——*Vid. Dyer* 108.

" The king to the sheriff, &c. greeting: Summon by good summoners, four lawful knights of your county, that they be before our justices at the first assises, when they shall come into those parts, to eleet twelve of the lawful knights of the neighbourhood of N, who may better know. and will speak the truth, to make cognizance of our great assise, between A demandant, and B tenant, of one messuage with the appurtenances in N, whereupon the same B who is tenant, hath put himself upon our great assise, and hath prayed that cognizance may be made, whether of them hath greater right in the messuage aforesaid, and summon by good summoners the aforesaid B, that he be then there to hear that election; and have you there the names of the aforesaid knights and this writ." *F. N. B.* 4. *b.*

Writ of Summons ad elegendas 4 Milites.

If there be not four knights in the county, the sheriff may return others*.

Raft Entr. 103 a.

25. At the return of twelve knights by the four, if they do not appear, a *venire facias*, instead of a *habeas corpora* shall be awarded to the sheriff, to cause them to appear by such a day. *Dyer* 270. *b.* *Vid. Co. Entr.* 181. *Leon* 1. *p.* 303.

(97)

Venire fac. to cauſe the jury returned by the 4 Mil. to appear.

26. There must be sixteen jurors of necessity to make the grand assise, *i. e.* 12. together with the four knights, *Dyer* 98. *Leon.* 1. *p.* 303. though the writ directed to the four knights is *ad eligendum de seipsis et aliis duodecim, &c. Dyer ibidem*†.

16 jurors to make the grand aſſiſe.

27. If four knights do not appear, but some of

Hab. Corp. 14

* 1 Revised Laws: 421. 2 Bl. 1262. where the sheriff in defect of knights returned 4 esquires.

† 1 R. L. 53.

bring in the 4 Mil.

them an *habeas corpora* shall issue to the sheriff, *Dyer* 79. *b.* and no *al' summons**.

Challange of the Knights al. sum. in cafe one challenged be withdrawn, Hab. Corpora againſt the reſt.

28. If four knights be returned and appear, and one is challenged and found true before the justices of the bench, an *al' summons* may be awarded to return another in lieu of him challenged, and an *habeas corpora* against the other, this was done 2 *P. and M. Michælmas term Dyer* 103. *pl* 8. which is contrary to other opinions, that the four knights should be challenged, or at least not to be challenged before the justices; for which see afterwards.

Oath of the 4 knights.

29. When the four knights appear, they shall be sworn lawfully and truly to chuse twelve knights, *gladiis cinctis*, of themselves and others, which best know, and will declare or say the truth between the parties† ; and the demandant and tenant may be ordered to go along with the four knights, to make their challenges to those that shall be chosen by them; for after the pannel made by the four knights, no challenge can be made either to the array, or to the polls before the justices. *Rast. Entr.* 241. *b.* 242. *Leon.* 1. *p.* 303. 7 *H.* 4. 20. 39 *E.* 3. *f.* 2. *Br. Droit.* 6. *Littleton Sect.* 514. *Co. Lit.* 294. *a.*

Challenge of the 4 knights how to be tried.

30. It is said, 15 *E.* 4. 1. *Br. Droit.* 12. against the opinion of *Co. Lit.* 294. That the four knights may be likewise challenged, but not before justices (as the case of *Dyer* is 103. before mentioned,) but where they and the parties are together when they are chusing the other knights; and if one be chal-

* If an elector of the grand aſſiſe leave the ſtate the court will grant a rule to add another to the panel. Thompſon J. diſſt 3 N. Y. T. R. 190.

† By our law they ſhall be ſeverally ſworn lawfully and truly to chuſe in the preſence of the parties, in addition to themſelves, 20 other good and lawful men of the county who beſt know and will declare the truth between the parties; to make recognition of the grand aſſiſe. 1 R. L. 43: vid ib. as to the qualifications of the recognitors and challenges to them.

lenged, it shall be tried by the other three; and if two be challenged, by the other two; and if three be challenged, a new writ shall issue to chuse other four knights, for no challenge shall be made by less than two.* (98)

31 The manner and form of the oath to the jury that are to try the cause upon the mere right. *Vid. Lit. Sect.* 514. *Leon.* 3. *p* 162. *Anders. Rep.* 1. *p. Heidon and Ibgreave's case.* 148.† Oath of the jury.

32 The tenant shall first begin his evidence in a writ of right. *Leon.* 3 *p* 162. *Heidon and Ibgreave's case. Moor Rep* 762. *Dyer* 247. *pl.* 75.‡ Tenant shall first begin his evidence.

33. Any thing but a collateral warranty may be given in evidence. *Br. Droit.* 48. What may be given in evidence.

34. If the seisin of the demandant or his ancestor be not in the time of the king, in whose reign he has alledged in his count, the tenant may tender *demy mark* to the king to have the seisin inquired by the *grand assise;* and then if the *grand assise* find not the seisin, as it is alledged, they ought not to enquire any further of the right. *Lit. Sect* 514. *Co. Inst* 294 *b.* 10 *E.* 3. 20. 10 *E.* 4. 9 See the case quoted by *Littleton Sect.* 514, abridged by Demy-mark.

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* If either party shall have cause to challenge the electors so summoned and returned, or any of them, such challenge shall be taken and made upon their appearance, and before they be sworn to make election of the grand assise, and not after; and the justices shall thereupon proceed to try and determine such challenges, in such manner as challenges in cases of common juries, are by law to be tried and determined. 1 R. L. 43 § 3.

† "I, sir James Esdaile, do swear that I will say the truth whether George Clark hath more mere right to hold the tenements which Francis John Tyssen, Esq demands against him by his writ of right, or the said Francis John Tyssen to have them as he demandeth and for nothing to lett to say the truth So help me God. 3 Wils. 541. Form of the oath.

‡ Qr whether the mere right on a writ of right is triable at Nisi Prius. See a learned opinion of Jud é Blackstone, 2 Black Com. 1265. that it may be so tried. See ib. form of summons of the knights.

Fitz. grand abridg. Tit. Droit 26. 3 *E.* 3. *Inter Northampton*, not elsewhere in any printed report.

Reason of the demy-mark.

Quere, the true reason of this tender of the *demy-mark*, I find no entry of it in any book of entries; but I have a manuscript copy of a record in queen *Elizabeths'* time, wherein the tender of the *demy-mark* is entered, but the parties and the number-roll I know not. The copy of the record at large follows here afterwards*.

* If his anceſtor happened not to be ſeiſed in the time of the king mentioned in the writ, although he was ſeiſed in another king's reign, yet the demandant might perhaps fail though this error, the ſame as if he had never been ſeiſed at all. But the iſſue to be tried by the great aſſiſe being, which of the parties had moſt right; the king's time did not properly come within the conſideration of the recognitors; and the right between the parties might be decided with juſtice in favor of the demandant, although he had failed in the time of ſeiſin mentioned in his count: when, therefore, the demandant had put himſelf on the great aſſiſe, and the tenant had ſuſpicion that the anceſtor was not really ſeiſed at the time mentioned in the count; as perhaps he was not born, or was dead at the time; he uſed to pray that the time of ſeiſin might be inquired of by the recognitors: and to obtain the favour of this extraordinary inquiry, it was the practice for the tenant to give ſomething, *dare de ſuo*, as Bracton calls it; this being, probably, a remnant of the old cuſtom of putting juſtice to ſale; an abuſe which was long permitted and made a gain of by our kings, and was at laſt provided againſt by a clauſe in the famous chapter of the great charter.

"To this text extracted chiefly from Bracton, Mr. Reeve has added the following note".——It is to be lamented that our author, who has opened to the modern reader ſo many ſecrets of our old juriſprudence, ſhould be leſs explicit on a point that has cauſed much difficulty amongſt lawyers. *The tender of the demi-mark*, as it was afterwards called, is the practice here noticed; but this is done ſo ſhortly as to throw no light upon it; and, unhappily, the paſſage is ſo obſcured by the uſe of a word, and that a tech-

35. There is a great question in the law, what is the most proper time for the tender of the *demy-mark*, whether at or before the joining of the *Mise* as it is in *Lit. Sect.* 514. at the joining of the *Mise* or at the time of swearing of the jury, as *Br. Droit*, 41. But the law is now taken, that it ought to be at the swearing of the jury. *Moor's Rep.* 762. *quere* whether at this day there needs any tender of the *demy-mark* at all, because at common law the seisin could not be traversed, but now issue may be tendered upon the seisin by the statute of 32 *H.* 8. *c.* 2. *Br. Droit*, 32. By which statute the seisin ought to be within sixty years. If the seisin be within sixty years, and it be alledged in the count *infra sexaginta annos jam ultimè elapsos tempore domini regis C.*——if it were not within that king's reign, if the tenant would have any advantage of it; I conceive he ought to make a tender of the *demy-mark* at this day. But *quere* whether he may not say in his count that he was seised within 60 years, and not mention any king's reign. And I conceive he may, because now the king's reign is not material, in regard the time of limitation is altered, which before was from the time of *H.* 2. and there-

Time of tender of the demy-mark.

Whether the demy-mark needs to be entered this day per ſtat. 32 H 8 c 2; ſeiſin to be within 60 years.

(99)

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nical one, in two ſenſes, that it is difficult to make out any meaning at all. Having uſed the word *mentio* to expreſs the naming of the time of ſeiſin in the writ, he afterwards uſes it to ſignify the moving the queſtion of ſeiſin by the tenant: *Dat aliquando tenens de ſuo pro habendâ mentione de tempore.* Perhaps ſome reaſon might be given in thoſe times, to ſhew that the king might accept this tender of money for a judicial grace, without violating magna charta. This perhaps might be thought to ſtand on the ſame footing with the king's ſilver, which is ſtill given *pro licentiâ concordandi.* The truth is, that the charter only aimed at flagrant and enormous partiality when obtained by corruption, and not at ſuch trifling payments as were made and accepted of courſe from every body, as a moderate recompence to the officers of the court for their labour and attendance. 1 *Reeve's Hiſt. of the Eng. Law*, 492.

fore it must appear to the court that the seisin was after his time, and so of necessity to alledge in what king's reign the seisin was. *Vid Co* 1 *Inst.* 114. *b.* ¶. 115. *a.* †. 2. *Inst.* 94 1 *Inst* 293 *a.*.

Thus much of the grand assise.

2 Battle. 36. The next kind of trial in a writ of right is by *battle*, and in such case the tenant offers *battle* thus, (which is called wageing of *battle**.——

Entry of wageing battle. "And the said L by his attorney, comes and defends the right of the said D (the demandant,) and his seisin, &c. and all, &c. as of fee and right, and chiefly of the tenements aforesaid with the ap-

Record. purtenances, &c. and this he is ready to defend by the body of his freeman, G B by name, who is present here in court to defend the same, by his body or in what manner soever, the court of the lord the king, shall consider that he ought to defend, and if any mischance shall befall the said G B, (which god defend) he is prepared to defend the same by another man, who &c. *Co. Entr.* 182 *a.*

The demandant joins thus——"And the said D says, that the said L unjustly defends the right of the said D, and his seisin, &c. and all &c. as of fee and right, and chiefly of the tenements aforesaid with the appurtenances, &c. because he says that he himself was seised of the tenements aforesaid with the appurtenances in his demesne, as of fee

* Trial by battle abolished. 1 R. Laws. 42.

The last trial by battle that was waged in the court of common pleas at Westminster (though there was afterwards one in the court of chivalry in 163 , and another in the county palatine of Durham in 1638 was in the thirteenth year of queen Elizabeth. A. D 1571, as reported by sir James Dyer: and was held in Tothill-fields, Westminster, "non sine magna juris consultorum perturbatione," saith sir Henry Spelman, who was himself a witness of the ceremony. 3 Bl. Comm. 338. The form is correctly extracted from the ancient writers by Blackstone in his commentaries, ib.

and right, in the time of peace in the time of the now lord the king, by taking the explees, to the value of &c. and that such is his right he is ready to prove by the body of his freeman H T by name who is present here in court, prepared to prove it by his body or in what manner soever, the court of our lord the king shall consider that he ought to prove, and if any mischance should befall &c. *Co. ib. Vill.* 1 *H.* 6. 7.

(100)

Waging battle. Proceedings therein tempore. H. 6. 1. H. 6. f. 6. b.

The case of 1 *H.* 6. *f.* 6 *b.* for the curiosity of it is worthy observation: In a writ of right for the manor of *Capenhaw*, in the county of *Northumberland*, *battle* was joined upon the mere right, and the *champions* appeared; and it was commanded by the court, that the *champions* of the tenant should put five pence into his *gantlet*, in every finger stall a penny, and deliver it into court; and so the demandant should do the same, and the judges received the *gantlets*, &c. The *champions* were ordered to appear the next day after the feast of St. Peter and St. Paul, in their array, and at the day *Babington* commanded the *champion* of the tenant to come over the bar, and come to the seat bare upon the east side, and so the *champion* of the demandant on the west side, and the *champions* being on their knees, the counsel of the parties were asked by the chief justice why they should not allow the *champions*, and why they should not wage the *battle*, who answered they knew no cause. The further ordering of the *champions* and the *battle*, and their array, you may see further in that case which is abridged by *Brooke. Tit. Droit* 20. And in the case of *Paramour*, *Dyer* 301 which is the last case of *battle* reported in our law books in the 13 *Eliz.* The entry of all the proceedings in this case of *Paramour* is in *Co. Ent.* 182. *a.*

Champions.

37. The *battle* cannot be performed by the demandant and tenant in their own persons, but they must find *champions*, because, if either should be slain, no judgment could be given. But in an appeal the parties shall fight for themselves, because if one be slain, the end of the combat is obtained. *Co. Inst.* 294. *b. Co. lib.* 9 *f.* 31, 32 *b.* The case of the Abbot of *Strata Marcella. Mirror c.* 3.

Essoin of the champion and his master.

38. After *battle* waged, the *champion* and his master may be both severally one after another essoined. *Fleta, lib* 6. *c.* 9 *in fine.*

Oath of the champions.

39. The *champions* must take an oath, the form whereof you may see in *Co.* 2. *Inst.* 247. At the common law, the *champion* for the demandant was to swear that he or his father saw the demandant in seisin of the lands, and that his father commanded him to prove it. But because *champions* commonly took the oath, though neither they nor their fathers ever saw the demandant in possession, therefore to avoid perjury that part of the oath was taken away by parliament. *West.* 1. *c.* 41.

(101)

Shall combat but once.

40. The *champions* shall combat but once, and therefore if they fight till the stars appear, the tenant shall prevail, for it is sufficient for the tenant to defend being in possession. *Co.* 2 *Inst.* 247. *a.*

Justices of the common pleas judges of the combat.

41. The judges of the *common pleas*, are judges. *ibidem.* If the *champion* be vanquished, the victory shall be proclaimed that he is vanquished, and he shall acknowledge his fault in the audience of the people, and pronounce the horrible word *(cravent)* and judgment shall be forthwith given, and the recreant shall *amittere liberam legem i. e.* become infamous, and never be of any jury or a witness. *Co.* 2 *Inst.* 247, 248.

So far of trial by battle.

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41. Trial by a common jury shall be where issue is taken upon any collateral point, and not upon the mere right, as upon a collateral warranty or the like. 9 *E.* 4. 40. *Br. droit* 48.

By a common jury.

42. The judgment in this action is in this form; *viz.* That the tenant hold those lands to him and his heirs in peace against the demandant and his heirs forever. Judgment final shall be given against the demandant, if the seisin be not found as he hath counted, or if after the *Mise* joined the demandant be nonsuited, or verdict he found against him. Against the tenant if he make default after the *Mise* joined, or confess the action, but yet not without a *petit cape*, *Co. lib.* 5 86. & 2 *Cr.* 292. *Lilburne versus Heron. lit sect.* 514. *Co.* 1 *Inst* 295. *b. Co lib* 5 85. *Penrin's case.*

Judgment in a writ of right.

Judgment after the Mise joined bind all ſtrangers that make not their claim within a year and a day: but this is to be after execution. Fitz Abridge tit. Fauxif. Recovery. 1. tit. Cont. claime 7. Pl. Co. 357. b Now no bar by equity of the ſtatute of non-claime. 34 E. 3. c. 16. Pl. Com. 360.

For the further illustration and practical understanding of what is before said, I shall proceed next to some entries of records, and precedents in this action, whereby what is before in theory, may be here seen in practice. Most of them are records in the castle of *Chester*, before the justices of *Chester*; and observable for their antiquity and jurisdiction of that court But I shall begin with that record before mentioned, *f.* 110. before the judges of the *common pleas* at *Westminster*, where the *demy-mark* is tendered, which entry of the *demy-mark* is not (as I think) in any book of entry extant in print.

Entries upon record.

(102)

The Record.

"And the said Q B, by T B, his attorney comes and defends the right of the said R, the now-demandant and the seisin of the said R N, Knight from which, &c. When, &c. And all, &c. And

Record.

whatsoever, &c. And chiefly of the tenement aforesaid with the appurtenances as of fee and right, &c. And puts himself on the grand assise of our lady the queen, &c. And prays recognition to be made thereof whether he himself hath greater right to hold the tenements aforesaid with the appurtenances to him, and the heirs male of his body to be begotten as he now holdeth them, or the said R, to have the same tenements with the appurtenances, as he above demandeth them, &c. And he tenders here into court, six shillings and eight pence, to the use of the lady, the now queen, &c. for that to wit, that it may be inquired, &c. of the time, &c. And he therefore prays that it may be inquired by the assise whether the said R N, knight was seised of the tenements aforesaid, with the appurtenances in his demesne as of fee, in the time of the said lord the king, Henry the eighth as the said R, the now demandant hath above alledged.—And the said R N, doth the like, &c. Therefore it is commanded the sheriff that he summon by good summoners four lawful knights of his bailiwick, girt with swords, that they be before, &c To elect from themselves, &c. to make recognition in the grand assise aforesaid. The same day is given as well to the said R, as to the said Q here, &c. At which day here come as well, &c. And the sheriff to wit, A B, now returns that he has caused to be summoned A B C & D, four lawful knights of his county, girt with swords, by John Doe and Richard Roe his bailiffs, to be here on the said octave of St. Hillary, to do as the writ thereof commands and requires, and that the said summoners and each of them are mainprised by M and N. And the said A B C and D, the four knights being solemnly called, come not but make default. Therefore it is commanded the sheriff that he have here on the morrow of the Trinity, the bodies of the said A B C and D,

Mise joined.

Tender of the demy-mark.

Writ to elect 4 knights.

Hab. corpora Militum.

the four knights girt with swords, to make election of the grand assise of our lady the queen aforesaid, between the parties aforesaid, of the tenements aforesaid, with the appurtenances aforesaid, in form aforesaid. The same day is given as well to the said R, as to the said Oliver and Agnes, here to hear the election of the grand assise aforesaid. At which day here comes as well the said R, as the said Oliver and Agnes, by their attornies aforesaid. And the said A B C and D, four knights, (103) &c. being called some of them, to wit, A B and C come, and said D, comes not. And it was commanded the sheriff that he have here at this day the bodies of the same A B C and D And the sheriff now returns that each of them were attached by John Man, and Hugh Den. Therefore it is commanded the sheriff that he distrain the same A B C and D, four knights, &c by all their lands, &c. And that of the issues &c. so that he may have their bodies on the morrow of all souls to make election of the grand assise of our lady the queen, between the parties aforesaid, in form aforesaid, the same day is given as well to the said R, as to the said O and A, here, &c. At which day here comes as well the said R as the said O and A, by their attornies aforesaid. And the sheriff now returns that the said A B C and D were severally distrained by him, by their chattels to the value of forty shillings, and mainprised by I and D. Whereupon the said A B C and D, four lawful knights, &c. being called each in his proper person comes and swears. And upon their oaths in presence of the parties aforesaid, chose of themselves and others sixteen, &c. to wit, E F I B, &c. good and lawful men, &c. to make recognition of the grand assise aforesaid. Therefore it is commanded the sheriff that he cause to come here on such a day to make the recognition aforesaid, the same day is given to the parties afore-

Distringas 4 knights.

Election of recognitors.

said, here &c. At which day comes here the said W, by his attorney aforesaid, and the said O and A, being solemnly called, come not, but make default. Therefore let the tenements aforesaid, with the appurtenances be taken into the hands of our lady the queen, and let the said O and A, be summoned that they be here on the octave of St. Michael, to hear thereof their judgment. At which day here comes the said W, by his attorney aforesaid, and the said O, on the fourth day of the plea, being solemnly called comes not, and hereupon comes the said Agnes the wife of the said O, here in court in her proper person, and says that the said tenements with the appurtenances which the said W, above against her and her said husband demands are the right of the said Agnes. Wherefore inasmuch as the said Agnes hath come before judgment thereof, rendered, prepared, to defend her right, and answer the said William, she prays that she by the default of the said O, her husband may not lose her right, but that she be admitted to defend her right: and she is admitted, &c. And hereupon the said W, demands against the said A, the tenements aforesaid, with the appurtenances in form aforesaid, &c and whereupon he says, that, &c. and the said A, vouches to warranty, &c.

Tenant makes default.

Petit cape.

Wife of tenant received.

(104) Pleas in the county court of Chester, held at Chester, before Bartholemew de Burgherst, justice of our lord of the county court of Chester, on Tuesday next, after the feast of St. Michael, in the year of the reign of the third king Edward, from the conquest the 37th.

Chester ss. John de Delves knight, and Isabella his wife, by their attorney demand against master John de Brunham the half of the fourth part of the manor of Malpas with the appurte-

nances, except one wind mill hides of land and six acres of woodland, in the same fourth part, as the right and inheritance of the said Isabella by the writ of the lord, the court of Chester, of præcipe in capite, &c. And be it known that the other half of the fourth part of the said manor, except the son of William Brereton knight. demanding together, &c. was summoned to be here at this day, &c. to prosecute, and now he comes not. Therefore it is considered that the said John de Delves, and Isabella may prosecute without, &c. And thereupon the same John de Delves, and Isabella say that a certain William the son of David le Clerk, was seised of the said fourth part, except &c. in his demesne as of fee and right in time of peace, in the time of Henry the late king of our lord the now king by taking thereof the explees to the value &c. And from the said William because he died without heirs &c. the rights &c. descended to a certain Philip as brother and heir &c. And from the said Philip the right &c. descended to a certain David de Malpas his heirs &c. And from the said David the right &c. descended to a certain Philip as son and heir &c And from the said Philip the right &c descended to the said Isabella who now demands together &c. And to a certain Ellen the sister of the said Isabella. As daughters and heirs &c. And from the said Ellen the right &c. descended for the part thereof to her belonging &c. to the said William the son of William as son and heir, who does not now prosecute—And that such is the right of the said Isabella, the same John and Isabella offer &c.

And master John de Brunham in his proper person comes and defends the right of the said Isabella when &c. And the seisin of the said William the son of David as of fact and right, of whose Releafe.

seisin &c. and chiefly of the said half part with the appurtenances except &c. And all &c. And saith that a certain John de Sayntpere knight was lately seised of the said tenements with the appurtenances
(105) in his demesne as of fee and right, and thereupon enfeoffed Master John de Brunham, and Richard de Stafford knights, John de Wingfield knight, and John de Hale to have and to hold to them and their heirs forever. By virtue of which feoffment the same Richard, John de Wingfield, John de Hale, and Master John were seised in form aforesaid, which said John de Wingfield and John de Hale have died whereby of the tenements aforesaid, hath accrued to the said Richard and Master John &c. Which said Richard by the name of Richard de Stafford on the 23d day of May in the 37th year of the reign of our lord the now king remised released &c. and altogether for himself &c. quit claimed, to the said Master John de Brunham all the right and claim which he had, or which he might in any manner have in the tenements with the appurtenances by the name of all the lands and tenements which lately were of John de Sayntpere knight in the county of Chester. And he puts himself upon the grand assise of the lord the count of Chester. And prays that recognition be made whether he hath more right to hold the tenements aforesaid with the appurtenances as his right as he now holds them, or the said John de Delves and Isabella as &c. day is given to the parties aforesaid, here to the next county court to wit, until Tuesday in the vigils of St Lucy the virgin, next ensuing and then let the four knights come here to make the election &c. at which day come the parties aforesaid. And Hugh de Venables knight, Thomas de Dutton knight, Adam de Houghton knight, and Henry de Norris knight, likewise come who upon their oaths in the presence of the parties aforesaid,

from themselves and others elected sixteen, Hugh de Venables knight, Thomas de Dutton knight, Adam de Houghton knight, Henry de Norris knight, Richard Feyton de Bolyn, Ranulpt de Weever, John de Thomas de Davenport, John de Hockenhull, William de Horton, William de Stanley, Richard Donne de Robert de Legh senior, Thomas de Stathum, and Edward de Cotton, to make recognition of the assise aforesaid. Therefore it was commanded the sheriff that he cause them to come here at the next county court, to wit, on Tuesday next after the feast of St. Hillary then next ensuing to make the recognition aforesaid &c. The same day is given to the parties aforesaid here &c. At which Tuesday the parties aforesaid &c. And the jury thereof between the said parties, was put in respite here between the said parties until this day, to wit, Tuesday next after the feast of St. Scholastica the virgin then next ensuing, for default of jurors &c. And now the parties aforesaid come and likewise the jury who by consent of the parties aforesaid, being elected, tried and sworn, upon their oath say that the said John de Delves and Isabella have more right to have the said half of the fourth part of the manor aforesaid with the appurtenances except &c. (106) to them and the heirs of the said Isabella as the right of the said Isabella as they demand the same than the said master John, to hold the same as he now holdeth the same, as the same John de Delves and Isabella above, by their writ aforesaid, have supposed. Therefore it is considered that the said John de Delves and Isabella do recover their seisin against the said master John of the half part aforesaid with the appurtenances to hold to him and the heirs of the said Isabella quit of the said master John and his heirs forever. And master John in mercy &c*. Judgment.

* Thefe records on account of the blanks left in them in the original, appears to have been imperfect.

Judicium.

Release pleaded.

Quere, what necessity there was of pleading of this release by one join-tenant to another; whether the same might not have been given in evidence, and the tenant have put himself upon the grand assise generally? I conceive he might for the reason before mentioned.

Seisin.

Note, here by this record, the tenant must defend the right of the demandant, and the seisin of him in whom the seisin is alledged in the count. And to confirm this, see *Co. Entr.* 182. *b.*

Count.

View.

Novel count.

Voucher.

Imparlance.

Cencea' vocar'

Summons ad warantizand.

Entr' in war.

Novel count.

Voucher over.

Entr' in war.

Novel count.

Confession

Judgment.

In the 2 *Eliz.* amongst the records in the castle of *Chester*, *Ro.* 12 *b.* There a writ of right is brought, and the tenant appears, and after the count, demands the view, which was granted returnable *die Veneris* the same sessions; then at the day and view returned, the demandant counts again, then the tenant imparles till the next sessions: At which next sessions the parties appear, and the tenant vouches, and the demandant imparles till the next sessions: at which time the demandant *(concedit vocare)* and then a summons *ad warrantizandum* issues, returnable the first day of next sessions, at which sessions the vouchee enters into warranty *gratis;* and the demandant counts again, and the vouchee vouches over, and the writ of summons *ad warrantizandum* returnable *mercur.* the same sessions, at which time the second vouchee appears and enters into warranty, and the demandant counts again against him, and the second vouchee confesses the action, and judgment given for the demandant against the tenant, and he over against the first vouchee, and the first vouchee against the second vouchee. The record in part is as followeth.

Pleas in Chester, before John Throcmorton, knight, justice of our lady the queen, at Chester, at a sessions held there on Monday the 27th day of May, in the year of the lady Elizabeth, by the grace of God, &c. queen, defender of the faith, &c. the Second.

Chester, ss. "John Manley, gent. by Edward Holland, his attorney, demands against Robert Sound one messuage, 40 acres of land and 20 acres of pasture, with the appurtenances in Shocklach, which he claims as his right and inheritance. Bre.

And whereupon the same John by his attorney aforesaid, says that one Nicholas Manley, the grandfather of the said John Manley, whose heir he is, was seized of the tenements aforesaid, with the appurtenances in his demesne, as of fee and right in time of peace, in the time of our lord Henry the seventh, late king of England, to wit, within sixty years last past, by taking thereof the explees to the value, &c. and from the said Nicholas descended the right of the tenements aforesaid with the appurtenances, to one Henry Manley, as son and heir of the said Nicholas, and from the said Henry descended the right of the tenements aforesaid with the appurtenances to the said John who now demands as son and heir of the said Henry. And that such is his right, he offers, &c. Count.

And the said Robert Sound by Robert Brooke his attorney, comes and defends his right, when, &c. and demands a view of the tenements aforesaid with the appurtenances, and he hath it, &c. day is given to the parties aforesaid, here until the next ensuing Friday in this same sessions, &c. and in the mean time, &c. and now, &c." Defence. View.

Seisin 60 years. Note, this count differs from the other by reason of the statute of 32 *H.* 8. *c.* 2, which has appointed the time of limitation for seisin in a writ of right to be sixty years. *Co. Entr.* 182. *b**.

Defence. The defence here entered is not right; for it should have been " Comes and defends the right of the said John Manley and the seisin of the said Nicholas, when, &c. and all, &c. and whatsoever, &c." as in the precedent before; and *Co. Entr.* 182. *b.* And in a record in the castle of Chester in the court of common pleas there before the justices of Chester, where view is demanded. *Ad com. tent. die martis prox. post festum sti. Hillarij.* 37 *E.* 3. *b.*

(108) Only I find this sort of defence (as in this record of *Q. Eliz.*) in *Co. Entr.* 181. *a*, in a writ of right of advowson upon a general imparlance, but upon a special imparlance in the very next action, there the entry is, as I have said before (*i. e.*) to defend the right of the demandant, &c.

Cstr. ss. Ad com' die martis prox' ante festum sanctæ Lucæ virginis. 38 *E.* 3. *Ro. Cestr,* lxxxiv.

A writ of right wherein many descents are mentioned in the count, to co-heirs, the tenant pleads a feoffment with warranty by the ancestor, who was seised, and puts himself upon the *grand assise.* And after the awarding of the summons to the four knights &c. the tenant makes default, and judgment finally is given, which ought not to have been (as I conceive) without a *petit cape*, *Co. lib.* 5. 86. and *Cr.* 2. *p.* 292. *Lilburn vs. Heron.* The action is between *John Collie* and *Agnes* his wife, and *John Witmore* senior and *Christiana* his wife against *Willielm*

* Limitation for seisin by our Law is 25 years as to a common person, and 40 years as to the state. 1 Rev. L. 562.

Dandy Johan. de Shagk, Johan. Gamel Capellan, and *Robert Picks Capellan,* for lands in *Middlewich* and *Newton.* This writ is a writ of right because the lord Hugh de Venables, knt. and Wm. de Holt, chief lord of the fee had remised his court to the said county court.

Com. Recoveries by Writ of Right in Chester.

In the 22 *E.* 4. rolls in the castle of Chester, there are several recoveries in a writ of right for security of lands, as common recoveries are now upon a writ of entry *sur disseisin en le post,* the tenant calls to warranty *A. B.* the vouchee appears *gratis,* and the demandant counts against him; then the vouchee joins the *mise* upon the mere right; and the demandant imparles, and at the same county court appears again, and the vouchee makes default in contempt of the court, and judgment final is given. One of the said records at large here follows, viz:

(109)

Pleas in the county court of Chester, at Chester, before Thomas lord Stanley, knt justice of his highness the prince, on Tuesday next after the feast of St. Ann, in the year of the reign of king Edward the fourth after the conquest of England, the 22d.

Count.

Chester, ss: "William Botiller and William Tatton in their proper persons demand against William Wiche and Margery his wife, the eighth part of the manor of Pickmeire, two messuages, one hundred acres of land, ten acres of meadow land, twenty acres of pasture, and six acres of wood land in Pickmeire and Wymancham as their right and inheritance by the writ of our lord the king, of right. *Præcipe in capite, &c.* And whereupon they say that they were seised of the said eighth part of the manor, the messuages, land, meadow, pasture and wood land aforesaid, with their appurtenances in their demesne, as of fee and right in time of peace, in the

time of the lord the now king, by taking thereof the explees to the value of, &c. And that such is their right they offer, &c.

Defence. And the said William Wiche and Margery his wife in their proper persons come and defend the right of the said William Botiller and William Tatton, when, &c. And their seisin of which seisin, &c. as of fee and right, &c. And chiefly of the said eighth part of the manor, the messuages, land, meadow, pasture and wood land aforesaid, with the ap-

Voucher. purtenances, and all, &c and vouches thereupon to warranty one Adam Brickhened who is present here in court in his own proper person, and freely warranteth the eighth part of the manor, the messuages, land, meadow, pasture and wood land, with the appurtenances, to them, &c. And hereupon the said William Botiller and William Tatton demand against the said Adam tenant by his own warranty the eighth part of the manor, messuages, land, meadow, pasture and wood land aforesaid, with the appurtenances in form aforesaid, &c. And whereupon they say that they were seised of the said eighth part of the manor, messuages, land, meadow, pasture and wood land aforesaid, with the appurtenances in their demesne, as of fee and right in the time of peace, in the time of the now lord the king, by taking thereof the explees to the value, &c. and that such is their right, they offer, &c.

And the said Adam the tenant, by his own warranty defends the right of the said William Botiller and William Tatton, when, &c. and their seisin of which seisin, &c. as of fee and right. &c. and chiefly of the said eighth part of the manor, messuages, land, meadow, pasture and wood land aforesaid with the appurtenances, and all, &c. and puts himself thereof on the grand assise of the lord the prince,

Grand Assise. &c. and prays that recognition be made, whether

he hath more right to hold the eighth part of the manor, messuages, land, meadow, pasture and wood land aforesaid, with the appurtenances as he now holds them as tenant thereof by his own warranty; or the said William Botiller and William Tatton, (110) to hold the said eighth part of the manor, messuages, land, pasture, meadow and wood land aforesaid, with the appurtenances as they above demand them.

Imparlance by demandant.

And the said William Botiller and William Tatton pray leave thereof to imparle, and they have it, &c. And afterwards at the same county court, &c. the same William Botiller and William Tatton come here again in court in their proper persons, &c. And the said Adam, although solemnly called cometh not again, but in contempt of court hath made default. Therefore it is considered by the court that the same William Botiller and William Tatton recover their seisin against the said William Wyche and Margery his wife, of the said eighth part of the manor, messuages, land, meadow, pasture and wood-land aforesaid, with the appurtenances to hold to the same William Botiller and William Tatton and their heirs, quit of the said William Wyche and Margery his wife and their heirs, and the said Adam, tenant by his own warranty, and his heirs forever. And that the same William Wyche and Margery have of the land of the aforesaid Adam to the value, &c. and the same Adam in mercy, &c.

Default of tenant.

Judgment.

In the time of *E.* 4 there are several actions of the same nature, both with single and double vouchers.

At the county court of Chester, before Gilbert lord de Talbot, justice, on Tuesday next before the feast of St. Dennis the martyr. 3. *H.* 5.

Chester, ss: "Richard del Vykers and Emma his wife, and Richard de Mottra and Isabella his wife, in their proper persons demand against Catherine who was the wife of Thomas del Hogh, of Thornton two parts of three parts of the manor de Leghton, near Neston, with the appurtenances, which together with another third part of the same three parts Thomas de Fytch and Margery his wife, here in court claim as their right by the writ of our lord the king, of right, &c. Summons and severance and judgment, that they prosecute without, &c.

Summons and Severance

And whereupon they say that one Amicia the daughter of William de Leghton, next of kin of the same Emma and Isabella, whose heir they are, was seised of the said third part, &c."

Mise join.

The tenant joins the *Mise* upon the mere right, therefore let the grand assise be thereof awarded *&c.* Then the summons awarded to return the four knights to elect twelve *&c.* at the next county court, which is continued by "the sheriff did nothing thereupon." And then at a further county the sheriff returns 4 knights summoned, *viz.* "George of Carrington knt. William de Stanley knt. John de Pull knt. and Rudolph de Bostock knt. who now are present in court upon their oath, *&c.* and have elected 12, *&c.* to wit, John de Letherland, John Lancelyn, *&c.* therefore they are summoned to be here at the next county court, *&c. which is continued to several counties by habeas corpora* and distringas, and that he summon the said 4 knights, that they be here at the same day *&c.* to elect and put upon their oath, 12 *&c.* such *&c. and then continued by* alias distringas, and that the said knights put *&c.* 12 *&c.* such *&c.* at length the jury appeared and by consent of parties, being elected, tried and sworn, *found for the tenant and judgment final given.*"

4 Knights sum.

(111)

Election of the Jury by the 4 Knights.

Distringas.

Verdict.

Judgment, pro ten'.

Note, in this record is nothing said of the four knights being joined with the jury, and therefore I conceive its said that the trial was by consent of parties.

PLEADINGS.

Pleas proper in this action.

There are pleas in abatement of the writ in this action, common to other real actions, as variance between the writ and count, false *Latin*, not pursuing the form in the register, death of one of the demandants, &c. and the like, of which I purpose not to say any thing considerable, but only as to what is proper to this action.

Abatement.

In abatement, it may be pleaded that the demandant had nothing in the land at the time of the writ brought, but to him and the heirs of his body, or for life, &c. beeause none but tenant in fee-simple can bring this writ. 5 *E.* 4. 2. *b.*

Count.

1. Because possession is an evidence of right and property; therefore in this and all other real actions in the right, (except such as are grounded upon the seignory, and not upon the seisin of the land, as a writ of *escheat*, right *sur disclam.* &c.) for recovery of lands and tenements, the demandant in his count must alledge a *(Seisin)* and taking of the profits which is called the *explees*, so that it must be an actual seisin, *viz.* "That he was seised of the messuage &c. in his demesne as of fee in time of peace in the time of our now lord the king, by taking explees to the value &c." 26 *H.* 8. 3. *Dyer* 114. 21 *H.* 6. 22.

(112)

Defcent in the Count.

2. If he counts of the seisin of his ancestor, he must set forth the descent of the right, as "from the said B descended the right of a certain C, and

from said C the said M as son and heir, &c. and that such is his right he offers, &c."

Seisin within 60 years.

3. Where he declares upon the seisin of his ancestor, he must alledge it within 60 years by the statute of 32 *H.* 8. *c.* 2. *Co.* 1. *Inst.* 114.*

Barr.

Defence.

First, the tenant must make defence both before plea to the writ, as before the barr, and again before the rejoinder to the replication. *Br. droit.* 11. 21 *H.* 6. 26. and the defence in a writ of right patent or close for lands, differs from all others, for whereas in other real actions the tenant defends his own right, *viz. defend. jus suum quando &c.* in this the tenant defends the right and seisin of the demandant, *viz.* " comes and defends the right of the said W (the demandant) and his seisin when &c." *Co. Entr.* 182. *a. b.* the true reason of this I could never yet find. *Vid. antea* 106.

Mise joint

In a writ of right where the *Mise* may be joined upon the mere right, there needs little of special pleading, for all or most of such matter (except a collateral warranty) may be given in evidence upon the mise joined upon the mere right. *Br. droit.* 48. *Vid. Lit. Sect.* 478.

Special pleading and over to the assise.

But if a man will plead specially in barr of the assise, he must take care that his plea be a barr, or else he must with his special matter conclude to the right, and put himself upon the grand assise, and therefore as to this, there is a rule taken by *Shard. p.* 34 *E.* 3. *tit. droit.* that where the plea pleaded, does not destroy the right of the demandant, but appears by the plea that he may have a right, he must

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conclude his plea, by putting himself upon the grand assise; but when by the plea it appears the demand-

* 1 R. L. 562. The periods of limitation.

ant has no right; as a fine levied by the demandant himself, or a release by him, or a collateral warranty, &c. he may conclude his plea to the action, *Judic' si actio. &c P.* 20. *E.* 3 *tit. droit.* & 34 *E.* 3. *tit. droit*, 29. And if the demandant reply and issue be taken, the trial shall be by a common jury, because it is out of the point of the grand assise, i. e. the mere right is not tried, but a collateral matter. *Br. droit.* 42, 43. *and* 30.

Trial by common Jury.

The tenant may plead that the ancestor of the demandant was never seised, *i. e. si. soit trove pon. se super, &c q. ad. pluis mel droit. P.* 35 *E.* 3. 3.

Quex fout bon Plees in Barr.

But he cannot traverse the seisin in such a king's reign, but must tender a demy-mark to the king, to have it inquired by the grand assise. 10 *E.* 3. 20. *tit. droit.* so note the difference; but now by the stotute of 32 *H.* 8 *c* 2 he may traverse such seisin (as I conceive) as is before said.

Seisin where traversable. Demy-mark.

A man may plead special matter, (as recovery in an assise) and conclude to the right. "And so a better right and he puts himself on the assise whether &c." for a recovery in an assise, cannot be in barr of a writ of right, because it only fortifies and evidences the right of possession, but not the mere right. *M.* 27 *E.* 3. 85. *droit.* 20. 8. *E.* 2. *droit.* 36.

Special matter, and concluded to the right.

3. Recovery in a *Cessavit* by default is a good barr in a writ of right, because the judgment is final by the statute of *Glocester, c.* 4. 6 *E.* 1, But if the recovery be by verdict, it is no barr, but he must conclude to the right. *M.* 31. *E.* 3. *droit.* 53. *Quær.*

Recovery in Cessavit.

4. An estate tail from the demandant and his ancestors may be pleaded in barr without joining the *Mise*, because the trial cannot be by battle or the

Estate-tail, or for life, &c pleadable.

grand assise, being but an estate tail; so bastardy or a lease for life, or years, &c, may be pleaded in barr. *Tempore E.* 1. *and droit.* 41.

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Recovery in writ of right.

5. A recovery by default in a writ of right, is no plea in a writ of right, but recovery by battle, or the grand assise, or inquest is a good plea, because the judgment is final. *Tempore E.* 1. *droit.* 50.

Estate mean Recovery binds all rights

6. A recovery in a *præcipe quod reddat*, and the demandant's title mean, between the *teste* of the writ and the judgment, is a good barr to a writ of right. For a recovery in real actions binds all rights and titles between the *teste* of the writ and judgment, and therefore in a *precipe quod reddat*, if the tenant alien, hanging the writ, the alienee shall not have a writ of right or any other remedy till the judgment be reversed, *Br. droit.* 24. 12 *Ass.* 41. 7 *E.* 4. 19.

Where tenant shall be compelled to shew his title.

Grand Assise.

7. Note, that *M.* 18. *E.* 3. *droit* 63 It appears the demandant may force the tenant to show a title, (and not suffer him to plead to the assise generally) by pleading in barr to the assise, as to say, that his grandfather's father had two sons, and he claims from the elder, &c. And prays judgment if the assise, &c. The tenant rejoins, that the grandfather's father had three sons, and enfeoffed the third, from whom he claims by descent, and sets forth the descent, and then prays the assise. Note, there the *demy-mark* tendered by the demandant to enquire of the seisin of his grandfather. *Tempore Henrici R.*

Demy-mark tender per Demandant.

Defens' de novo.

8. If the demandant reply to the barr, the tenant must make a defence *de novo* in his rejoinder, 21 *H.* 6. 26.

Voucher, Aid Grand Assise.

9. Note, the tenant may vouch, pray in aid, plead in barr, or put himself upon the assise, and the vouchee or prayee in aid may have like pleas. 21 *H.* 6. 26.

10. A collateral warranty is to be pleaded in barr and not to be given in evidence upon the *Mise* joined, and the reason I conceive to be, because the warranty does not prove any right, i. e. *mitter le droit* out of the feoffer, and put it into the feoffee, but only barrs him of his right by force of the covenant real, so that if the *Mise* should be joined upon the mere right, the warranty would not help because the grand assise must give their verdict upon the mere right, which remains still in the party, notwithstanding the warranty, but if he plead the warranty in barr, then the demandant is estoped by his warranty. *Lit. Sect.* 478. Collateral Warranty. (115)

11 In regard all special matters may be given in evidence in a writ of right upon the *mise* joined, therefore that is the safest way so to plead. Evidence upon the Mise.

12. But if the matter in barr to the assise be clear, then it is sometimes most for the advantage of the tenant to plead it, and not put himself upon the grand assise, which is very dilatory, and may become vexatious to the tenant by the practice of the demandant, by not prosecuting and suing out process as he ought, and many other delays for want of knights, their not appearing or the like: and this mischief and vexation to a tenant in a writ of right lately brought before the justices of *Chester* about the 34 or 35 *Car.* 2. Between *Wibunbury* and others demandants, and one *Bolton* tenant, wherein the demandant had a design merely to vex and weary out the tenant, who had an undoubted title and interest. The tenant there, put himself upon the grand assise, (where he might have pleaded in barr) and by that means he sufferred much by attendance from assises to assises, and could not bring it on to trial, (though he much endeavoured it) through slowness in suing out process by the demandant, want of appearance of the Sometimes better to plead in barr to the Assise.

knights, &c. and the demandant would not consent to any thing for expedition, but afterwards one of the demandants died, and so the writ abated, which might have been prevented by pleading in barr, for then it must have been tried by a common jury.

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CHAPTER IV.

Of a Writ of Right Close.

What.

1. THIS writ is peculiar to lands in ancient demesne, and is always close, and it is directed to the lord of the manor, or sometimes to the bailiff of the manor thus.——

The writ.

The king &c. We command you, that without delay, and according to the custom of our manor of J you do full right to A of one messuage with the appurtenances in J whereof B unjustly deforceth him, that we may hear no more clamour thereupon for want of right. Witness, &c. *F. N. B.* 11. *q. Rast. Entr.* 241. *b.*

Protestation to sue, in what nature of a writ.

He that brings the writ, may make protestation to pursue it in nature of what writ he pleases, either in nature of a writ of right, and then the process is as in a writ of right before, and the count and all other proceedings, or in nature of an assise of *Novel disseisin*, *Cui in vita*, or any other real writ, and therefore may be brought by tenant for life, in tail or in dower, and then the proceedings

By tenant for life.

are in nature of the writ fixed upon by the protestation. *F. N. B.* 26, 27. *Rast. Entr.* 242. *a.*

Not removeable out of the lord's court.

This writ cannot be removed out of the lords court, but where the land is free land, or where the demandant is steward 34 *H.* 6. 35. 1 *H.* 7. 30. 9 *H.* 7. 11. *Rast. Entr.* 242. *b.* 243. *a. b.*

In case of a foreign voucher, the tenant must pursue a *supersedeas* to the lord's court, to cease till the voucher be decided by a *warrantia chartæ* in the *common pleas*, *F. N. B.* 31. Foreign voucher, superfedeas

If the *mise* be joined upon the mere right, it is a question whether the record shall not be removed into the *common pleas*, in the 1 *H.* 7. 30. *Per Townsend* it shall be removed, but adjudged *contra*, *Dyer* 111. 12 *Ph.* & *M.* and a *procedendo* awarded. And in *Rast. Entr.* 141 *b.* Process is awarded to four ordinary men to chuse the grand assise in the court of the manor. The record is removed by an *accedas ad Cur. Rast. Entr.* 242. *b.* 243. *a. b.* Where mise is joined, whether removable (117)

CHAPTER V.

Of a Writ of right in London.

THIS writ of right is of the same nature with the writ of right patent, only different as to the place where the lands lie, *i. e.* concerning lands in *London*; the writ is directed to the Mayor and sheriffs of *London*, thus.—— What.

The king &c. to the mayor and sheriffs of *London*, greeting: We command you, that without delay you do full right to E of N of one messuage and two shops with the appurtenances in *London*, which he claims to hold of us by free service, &c. whereof W deforceth him, that we may hear no more clamour thereupon for want of right. Witness, &c. F. N. B. 6. *b.* The writ.

Vid. a recovery and entry of proceedings in this writ, *Co. Lib.* 1. 7, 8. where the vouchee joins the *mise* upon the mere right.

The plea upon this writ is not removeable out of *London* by *Tolt*, *Pone* or *Recordare*; but in case Not removeable by tolt, &c.

of a foreign plea, or foreign voucher, there the record shall be removed into the *common pleas* by writ out of the *chancery*, and shall be remanded, when the warranty is tried by the statute of *Glocester c.* 12. *Vid. F. N. B.* 14. how it shall be removed, *Co Entr* 176, 177 *a. b.* But the statute of *Glocester* is corrected by the statute *de forensis vocatis ad warrantiam.* 9 *E.* 2 as to the manner of the removal. *Co.* 2 *Inst* 324, 325.

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CHAPTER VI.

Of a Writ of Right of Dower.

What.

THIS writ is of little use or practice because of the ordinary writ of dower *(unde nihil habet)* for ordinarily now the wife has no part of her dower assigned to her when she sues for dower, and unless she have some part of her dower in the same town, and of the same person, and sues for the residue, she needs not bring a writ of right of dower, but the other, *unde nihil habet*, *Registr.* 3. *Westm.* 1. *c.* 48.

Is patent, to whom directed.

2. This writ is patent, and is directed to the heir of the husband to do right to the wife in his court, or to the guardian, and is removeable as the other writ of right patent, and in the *common pleas* the process is the same. The form of the writ is thus,——

The writ.

The king to A greeting: We command you, that without delay you do full right to B who was the wife of C of a third part of ten acres of land with the appurtenances in W which she claims to hold of you in dower by the free service of a third part of one penny *per annum* for all service, whereof C unjustly deforceth her, &c. *Reg.* 3. *F. N. B.* 8. *b.*

This is in case where the heir hath a court, but if he have none, then the writ of right is directed to the sheriff returnable into the *C. Pl.*

3. In this writ as well as the writ *unde nihil habet* there's no count, but a demand, thus, *viz.*——A who was the wife of T by I S her attorney demands against M the third part of one messuage &c. with the appurtenances in W as dower of the said A from the endowment of the said T her late husband &c. *Rast. Entr.* 234 *b.* Demand in lieu of a count.

4. *Note*, In dower and assise the defendant makes no *defence* but always saith *(Ven & dic)* and not *Ven. & defend. &c. Rast. Entr.* 232. *b.* More shall be said when we come to a writ of dower *unde nihil habet*, and the pleadings I shall refer to that chapter. No defence.

CHAPTER VII. (119)

Writ of Right de rationabili parte.

1. THIS is a writ of right between privies in blood only, as between brothers in *Gavelkind*, and sisters and other coparceners, where one deforceth another, and lies only for lands in fee simple. As if the ancestor make a lease for life, and die, and after the lessee die, and one of the brothers or coparceners enter and keep out the rest, he or she so kept out, may have this writ. *F. N. B.* 20. This writ is patent. What.

2. But if the ancestor die seised, the *nuper obiit* is the proper remedy, and against a stranger a *mort-dancester*, and in ease of an estate tail, a *formedon* must be brought by one coparcener against the other, *F. N. B.* 22, 23. The form of the writ is thus: Nuper obiit where the Ancestor dies seised.

" The king, &c. We command you, that without delay, you do full right to W F of ten acres of land The Writ.

with the appurtenances in B, which she claims to be her reasonable part, which belongs to her of the free tenement which was L's, her father's or mother's, uncle's or aunt's, or cousin's in the same vill, and to hold of you by the free service of the third part or fourth part of one penny per annum for all service, whereof B and S. unjustly deforce her. *F. N. B.* 9 *b.* *Registr.* 3. *b.*

Removeable into Common Pleas.

3. This is removable into the *Common Pleas* as others; *view*, *battle* nor *voucher* lies in this writ, nor can the tenant put himself on the *grand assise*, because of the privity of blood *F. N. B.* 22. *pl. com.* 306. *Finch law* 294.

Count.

4. The count is thus: "Whereupon she says that the said W the father, &c. was seised of the whole of the tenements aforesaid, with the appurtenances in his demesne, as of fee and right in time of peace, in the time of the now lord the king, by taking thereof the explees to the value, &c. And from the said W the father, descended the right, &c. to the said I E and A as daughters and heiresses, &c. which said E and A hold the whole and deforce the said I of her reasonable part and thereupon she produceth suit, &c. *Rast Ent.* 541.

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Pleadings in this Writ.

Non-tenure.

1, *Non tenure* is no plea in abatement in this action, *F. N. B.* 22.

Defence.

2. The defence is "come and defends the force, &c." *Br. Defens.*

Barr.

3. The tenant may plead, (as I conceive) that the ancestor died seized in abatement of the writ, *Registr.* 3 *b.* *F. N. B.* 22, 23. For in that case the demandant ought to have a *Nuper obiit.*

4. So he may plead in abatement, that the ancestor had nothing in the land, but to him and the heirs of his body or some other estate tail; in which case one coparcener ought to have a formedon against the other, *Reg. and F. N. B. ibidem.* Barr.

The tenant cannot vouch, demand the view, offer battle, put himself upon the grand assise in this action, because of the privity of blood, *F. N. B. ibid Finch law* 294 *Pl. Com.* 306. Voucher View Battle, Grand Assise lie not.

CHAPTER VIII. (121)

Of Writ of Right of Advowson.

1. AT the common law there were three writs for the recovery of the possession of an advowson or right of patronage. 1. The one was merely in the right, as a writ of right of advowson, and the other two possessory, *i. e. ultimæ presentationis*, and a *quare impedit*, *Vid. Stat. W.* 2. *c.* 5. *Co.* 2 *Inst.* 356. *b.* What.

2. By the common law, if one that had no right had presented by usurpation, and his clerk was admitted and instituted (which makes the church full in case of a common person) that had put the lawful patron out of possession, and the usurper had thereby gained the inheritance, and the rightful patron was put to his writ of right of advowson to recover the inheritance, but the incumbent could not be removed. This was the case of all common persons whatsoever, as may be seen at large in *Boswell's case. Co. lib.* 6. 49, 50, 51. Usurpation at Com. Law.

3. But because infants who claimed by descent, and feme-coverts, and persons in reversion depending upon lives or years, as upon the life of tenant by the curtesy or in dower, were many times greatly prejudiced by such usurpations which they themselves could not possibly prevent; therefore the stat. Stat. W. 2. c. 5

of *Westmin.* 2. *c.* 5. was made, that in such cases the infant, &c. should not be put to his writ of right, but have such action by *quare impedit*, or assise of *darrein presentment* as the ancestor might have had.

Quare Impedit

2ly. It was provided by that statute, that plenarty in an assise of *darrein presentment* or *quare impedit* shall be no plea if the writ were purchased within six months next after the church is full, *i. e.* after institution (as I conceive.) *Vide Co.* 2. *Inst.* 360. This six months shall be computed according to the calendar, and not according to twenty eight days *per mensem. Co.* 2. *Inst.* 361. 3ly. By this statute damages were given in a *quare impedit* and *darrein presentment*, *i. e.* two years value, if the patron hath lost his presentment by lawful collation of the bishop *hac vice*, or otherwise only half a year's value, if the incumbent be removed by judgment within the six months or after. *Co. ibidem* 363.

Six Months according to the Calendar.

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At Common Law, purchaser could not have a Writ of Right, remedy per Stat. W. 2 c. 5.

4. At the common law a purchaser could not have a writ of right unless he had once presented, but was without remedy; but now by the second provision in this statute of *W.* 2. he may have a *quare impedit*, if he commence it within six months. *Co.* 2. *Inst.* 358. So an infant purchaser is not within the first, but within the second branch of the statute of *W.* 2. *c.* 5. *Vide Boswell's case*, 50. *b.*

Of the nature of the *quare impedit*, more shall be said in its proper place; but by these things premised, the nature and use of the writ of right may be better understood.

The writ is thus:

The Writ.

"The king, &c. to the sheriff of C greeting, Command A that justly, &c. he render B the advowson of the church of S from which he unjustly deforces him as he says; and unless, &c." *Reg.* 29.

This writ is always to be brought by him who is seized in fee-simple, and not by tenant for life, or in tail, but at the common law tenant in tail might have this writ because he was then tenant in fee-simple conditional. Therefore since the statute *de donis conditionalibus* in case of an usurpation the issue in tail would be without remedy, but for the statute of *W. 2. c. 5* where the issue in tail is taken to be within the equity of that statute to have a *quare impedit* as well as an infant or feme-covert. *Vide Boswell's case. Co. lib. 6. f. 51.* By whom to be brought.

The process before and after appearance, are the same as in other writs of right patent. Process.

The count is thus:

"Whereupon he says that a certain I M, the grandsire of the said T, whose heir he is, was seised of the advowson of the vicarage of said church as of fee and right, in time of peace in the time of the lord Henry, late king of England, and being so seised, presented to the said vacant vicarage, a certain I L, his clerk, who at the presentation of said G M was admitted, instituted and inducted in the same time of peace in the time of the said late king, by taking thereof the explees as in great tithes, lesser tithes and revenues, to the value, &c. as of the right of his said vicarage, and from the said G M descends the right of the said T who now demands as kin and heir to the said G M, to wit, as son and heir of said R, son and heir of said G M, the grandsire, &c. and that such is his right he offers, &c." Count. (123)

5. The tenant may imparle, demand the view, vouch, offer battle or put himself upon the grand assise, as in other writs of right. *Co. Entr. 181. b. 182. a. Rast. Entr. 103. b.* View, Vouche, Battle, Grand Assise.

Indicavit.

6. If the right of tithes between two parsons of several patrons, come in question in the spiritual court, then he who is there sued, may have a writ called an *Indicavit*, which is in nature of a prohibition to the spiritual judge not to proceed till the right of the patronage be tried in the king's temporal court, and then he who is prohibited may sue a writ of right of the advowson of tithes, and this writ must be brought by the patron of the parson prohibited, by the statute of *Westminster* 2. *c.* 5. for at common law the parson prohibited was without remedy, for the two parsons could not maintain a writ of right between themselves. *Co.* 2. *Inst.* 364.

The Writ of right of Tithes

This writ of right of advowson of tithes is thus: "Command A that he render to B, the advowson of the tithes of one third part of the church of S, or of one fourth part, or of a moiety of the church, &c." *F. N. B.* 30. *a. Regist.* 29.

Where the parson may plead to the Right.

7 This writ is to be brought to try the right of the advowson, which ought not to be tried in the spiritual court, and if the patron be not seised in fee, he cannot have this writ, but in such case, the defendant in the *Indicavit*, appearing upon the attachment, may plead to the right of tithes in the king's court by construction of the statute of *W.* 2. *c.* 5. otherwise the parson prohibited were without remedy. *Co. ibidem.*

(124) Remand the Cause.

8. If the right be tried for the demandant, the cause shall be remanded into the spiritual court. *ibidem.*

Indicavit, where, Stat. 9 E. 2.

9. By the statute of *Articul' cleri c.* 2. an *Indicavit* might be granted, let the value of tithes demanded be what they would; but by that statute made 9 *E.* 2, they must amount to the value of the fourth part of the church. *Co.* 2 *Inst.* 364. *F. N. B.* 71.

This writ of right of advowson is now little in use, because upon an usurpation, the patron now by the statute of *W.* 2. *c.* 5. has six months after to bring his *quare impedit*, which is seldom let slip, but if he do not bring his *quare impedit* within that time, then he is put to his writ of right at this day, unless the patron were an infant, feme covert, &c. which are holpen by the statute of *W.* 2. *c.* 5. Where useful at this day.

Pleas in this Action.

1, Though this be a writ of right, and by the common law cannot be brought by any but a tenant in fee-simple, yet the tenant cannot plead as in a writ of right patent, or other writs of right for land, that the demandant has nothing but in tail: because in this action the tenant in tail is holpen by the equity of the statute of *W.* 2. *c.* 5. Otherwise tenant in tail would be without remedy. *Boswell's Case. Co. Lib.* 6. 51. What cannot be pleaded as in other Writs of Right.

2. The defence is in this as in other writs of right for land, *Rast. Entr.* 103. *a. Co. Ent.* 181, 182. *a.* Defence.

3. He must alledge both institution and induction in the count, or this writ lies not. 26 *H.* 8. 3. *Br. Droit.* 1, Count.

4. He may join the mise, &c. and put himself upon the grand assise, or offer battle. *Rast. Entr.* 103. *b. Co. Entr.* 181, 182. *Dyer.* Grand Assise, Battle.

5 He may plead in barr the same pleas as in writs of right for lands, &c. and the same as in a *Quare Impedit, quod vid postea.* Barr.

CHAPTER IX.

Of Writs of right in their nature.

Writs of Right in their nature.

WE have now done with writs of right, properly so called, there are other writs, which are writs of right in their nature, which are most of them of little use, and some of them altogether useless, (as to practice) yet for method and learning sake, we shall take them before us; they are these; *viz.*

Writs of right in their nature.

1. *Ne injuste vexes.*
2. *Nativo habendo.*
3. *Quo jure.*
4. *De rationabilibus divisis.*
5. *De recto custodie.*
6. *De consuetudinibus et servitiis.*
7. *Secta ad molendinum.*
8. *De recto disclamando.*
9. *Cessavit.*
10. *Escheate.*
11. *Breve de Medio* { 1. *in Remainder.* 2. *in Reverter.* } *ad c. leg.*
12. *Formedon* { 3. *in Descender.* } *p. st.*
13. *Breve de Dote unde nihil habet.*

Why so called.

These are so called to distinguish them from the pure writ of right, which is always to be brought by him who is tenant in fee simple, and is for the recovery of lands and possessions; but these, some of them may be brought by tenant in fee, for life, or in tail, and in others of them, neither battle nor the grand assise lies, and most of them concern relief to be had for other things, than the recovery of the possession of lands and hereditaments.

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CHAPTER X.

Ne injuste vexes.

What.

1. THIS is an ancient common law writ, and not grounded upon the statute of *Magna charta*,

as *F. N. B* supposeth; and it lay when the tenant and his ancestors had held of the lord and his ancestors by such services, *i e.* fealty, and 2*d.* &c. and the lord had obtained seisin of more or greater services (as of 3*d.*) by the payment of the tenant himself, and then distrained upon his tenant for this 3*d.* the tenant could not avoid this in an *avowry*, because of the seisin by his own hands, but was driven to this writ directed to the lord, and is in nature of a prohibition, and is patent thus, *viz.*——

"The king to A greeting: we command you, that you unjustly vex not, or permit to be vexed, B concerning his free tenement which he holds of you in J nor therefore require or permit to be required of him customs or services which he oweth not, nor is used to do for the same; and unless you will do this, the sheriff of *Lincoln* shall cause the same to be done, that we may hear no more clamour thereupon for want of right. *Co.* 2 *Inst.* 21. *F. N. B.* 10. *b.*" The Writ.

The process in this writ is an attachment and distress against the lord. And when the lord appears upon the attachment, then the tenant shall count against him in the *common pleas*, and the lord shall make defence, and defend the wrong and force, &c. and shall plead in nature of a count upon a writ of right, which count the tenant shall defend, and may put himself upon the grand assise. *Rast. Entr* 57*. The Process.

So note that in this action there are two counts, and the lord who is tenant in the writ, is made actor or demandant in the proceeding, as in an *avowry*. *Vid.* for all this, *Rast. Entr.* 437. Two Counts in this Action, Tenant Actor.

* The process is prohibition, attachment and distringas, against the lord. *F. N. B.* 10. D.

By whom to be brought. This writ is to be brought by tenant in fee simple. But tenant in tail may avoid such seisin had by the hands of his ancestors, by plea in an *avowry* by virtue of the Stat. of *Magna Charta*, *c.* 10. So may tenant for life, *&c. Co.* 2 *Inst.* 21.

(127) Battle. Battle may be offered by the lord in this action. *F. N. B.* 11. *French.*

Judgment final. Judgment final may be given in this writ. *Rast, ibidem and F. N. B.* 11. And that upon default or non-suit after the *mise* joined. *F. N. B. ibidem.*

Note, if the lord distrain for other services, the tenant may traverse the tenure in an *avowry*, or if the incroachment be gotten by coersion of distress, *Co.* 2. *Inst.* 21.

Pleas in this action.

Count. For the count see *Rast. Entr.* 437. *b.*

Defence. The defence by the lord is, "comes and defends the force and injury, when, &c."

Barr. The general barr is, "that he hath not unjustly exacted the said rent of ten shillings besides the said other services, because he says that, &c." And then makes a title in nature of a count, and so becomes actor.

Replication. In the replication, the plaintiff makes defence, as the tenant does in a writ of right, and puts himself upon the grand assise.

CHAPTER XI.

Of Nativo Habendo.

What. 1. THIS is a writ directed to the sheriff to deliver the lords Villain or Bondman, who is run away

from his lord's manor; and the lord must enter a plaint in the county court first, as in a *replevin*, which may be removed by a *pone* into the *common pleas*, and there the lord may declare.

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Process.

2. The process is summons, attachment and distress.

Libertate probanda.

3. The sheriff cannot seise the Villain if he says he is free; but in such case the lord may remove the plaint by *pone*; or the Villain may sue forth a writ *de libertate probanda*, and then all must cease till the record be removed before the justices in *Eyre*, and there the lord may proceed. *F. N. B.* 186. English.

Seisure of the villains. Stat. 25 E. 3. c. 8.

4. By the statute of 25 *E.* 3. *c.* 8. the lord may seise the Villain, although the *libertate probanda* be depending. *F. N. B. ibidem.*

Two to Confess, or Writ abate.

5. The lord must have two of the blood of the Villain ready in court to confess themselves Villains to the lord, and alledge the same in his count, or the writ shall abate. *F. N. B.* 189. *English.*

Count, &c.

For the count, pleading and judgment, *vide Rast.* 436. *a. b.* 437.

Battle or Gr. Assise ne gist.

Battle, nor the grand assise are not in this action.

This writ is now much out of use. The last we have in our books are *Butler and Crutches* case. 11 *Eliz. Dyer* 283. and *Dighton & Bartholomew's* case, 1 *Jac. in Yelverton* 2, and reported by *Cr.* 44 *Eliz.* 3. *part* 881.

CHAPTER XII.

Quo. Jure.

What. THIS writ concerns common, and lies against a man who claims common in land, whereof the owner is seised in fee simple. The writ is thus—

The Writ. "The king to the sheriff, &c. If A. shall make you secure, &c. then summon, &c. B. that he be &c. to shew by what right he demands common of pasture in the land of him the said A. as the said A. hath no common in the land of him the said B. neither doth the said B. service to him for which he ought to have common in the land of him the said A. as it is said: and have there, &c." *Registr.* 156. *F. N. B.* 128. *c.*

Process. 2. The process before appearance is summons, attachment and distress, and after appearance in case of default, a grand distress shall issue in lieu of a *petit cape*. *F. N. B. English* 310.

Two Counts, Tenant actor. 3. In this action the plaintiff counts, and then the tenant makes defence, and pleads in nature of a count in a writ of right, alledging seisin, and taking the *explees, et quod tal' sit jus su' offert*, &c. And then the plaintiff defends the right of the defendant and his seisin, and may either put himself upon the grand assise or battle, *Vid. Rast. Entr.* 539. *a. b.*

Two Counts. 4. So note, here are two counts, and the defendant in the writ becomes actor in the proceedings, as in *replevin* and the *ne injuste vexes* before.

Summons, & Severance lie. 5. Summons and severance lies in this writ, and several may be joined in this writ, but they must make several defences, and put themselves severally upon the grand assise. *F. N. B.* 310 *Engl.*

This writ is out of use likewise, for actions of trespass, and upon the case are now generally used for the deciding the right of commons.

Pleas in this Action. (130)

As to the count, barr, replication, how the defendant is become actor, *vid. antea.* Count, &c.

The defendant may plead in barr common by prescription, appurtenant to a tenement. *Rast. Entr.* 539. *b.* Barr.

In the replication, the plaintiff makes defence as in a writ of right, and says the land is *solum suum separale*, and traverseth the prescription, and then puts himself upon the grand assise. *Rast. ibidem.* Replication.

So note a traverse of the defendant's plea and joining of the *mise*, &c. in one and the same plea.

CHAPTER XIII.

De Rationibilibus Divisis.

1. THIS writ lies where two men or more are seised of lands in several townships, the lands in one township being to one, and the lands in another, being to the other, and there is a difference how far the several townships extend, and therefore to have a reasonable division by metes and bounds, this writ was used. This writ is directed to the sheriff, and determinable before him, as a *replevin*, but may be removed into the *common pleas* by *Pone. Vid. F. N. B.* 311. *English.* The writ is as follows.— Where lies.

"The king to the sheriff, &c. We command you, that justly and without delay, you cause reasonable bounds to be set between the land of A. of B. in C. and the land of D. of E. in F. as there ought and have been used to be, whereupon he the said A. complains that the aforesaid D. draws more The Writ.

thereof to his fee than belongs to him to have, &c. Witness, &c." *Regist.* 257. *F. N. B.* 128. *a.*

(131) By whom to be brought.

This writ is to be brought only by tenant in fee-simple, and the process is summons, attachment, and distresss, and upon default after appearance, division shall be made according to the demandant's count, without any further process as I conceive. *Vid.* the count, *Rast. Entr.* 541. where after the bounds set forth, the demandant sets forth in his count the seisin of the land encroached, and the taking of the *explees*, as in a writ of right. The *mise* may be joined by battle or the grand assise. *F. N. B.* 311. *Engl. Rast. Entr.* 541, 542. This writ is now much out of use. For the trial by *ejectione firm'* will ascertain the bounds of townships by witnesses.

Pleas in this Action.

Several defence by several defendants.

If there be several demandants, the tenant must make his defence severally, and may join the *mise* by battle or grand assise. *F. N. B.* 129. *French.*

Joint-tenancy or coparcenary no plea.

Join-tenancy or coparcenery is a good plea in abatement to this writ. *F. N. B. ibidem.* View, summons, and severance lies in this writ. *ibidem.*

CHAPTER XIV.

Breve de Recto Custodiæ Terrarum et hæredis, De Consuetudinibus et Servitiis, Sur Disclaimer, Cessavit, Escheate, et De Medio.

These Writs, when in use.

THESE writs were of use when wards and tenures were in force and practice, but now all tenures being turned into common soccage, and the court of wards and liveries being abolished by the statute of 12 *Car.* 2. *c.* 24. these actions are now out of use, and therefore I have couched them all into one chapter, and shall do little more than declare the nature of them severally, and in what case they lay.

Note in general, that it is held as a rule in law, that in writs of right which concern the seigniory, neither battle nor the grand assise lay. *Br. Droit.* 34.

1. *De recto custodiæ terrarum et hæredis.* This writ was provided for the lord in knights service, where his tenant died in his homage, and a stranger entered into the land and took the body of the heir, he might have this writ to recover the land and the heir. *F. N.B.* 139. *Fr.* or he might have his writ *de custodiæ hæredis* is only, if the heir were detained, *ibidem.* Or *custodiæ terrarum* only, if the land were only withheld, *ibid.* See the several writs there in *F. N.B* Of a writ of ravishment of ward, of intrusion against the ward, *ejection custodiæ* by guardian in soccage and guardian in chivalry, &c. What.

2. *De consuetudinibus et servitiis.* This is a writ of right in its nature for the lord against his tenant, who withholds from him the rents and services usually due to the lord for the land. *F. N. B.* 151. *Fr.* What.

This writ may be sued returnable into the *common pleas*, and directed to the sheriff, or it may be sued in the county by justicies, *ibidem.* Returnable into common pleas.

See the writs there. Command A that he do, &c. the customs and services which he ought to do to him, &c. The Writ.

The writ is in the *debet et solet*, when he counts of his own seisin. *F. N. B.* 151. *b.* but in the *debet* when of the seisin of his ancestor, *ibidem.* Debet and Solet.

Several tenants may be sued by one writ, by several *præcipes*, 151. *ibidem.*

This writ may be brought both by tenant in fee-simple, and by tenant for life or in tail; and the writ By whom to be brought.

is close, *ibidem*. And the *mise* may be joined and put upon the grand assise, *ibidem*.

Count. *Vid.* The count, *Rast. Entr.* 143. *b.* The tenant may disclaim if he will. *F. N. B. ibidem.*

(133) What. 3. Writ of right upon disclaimer. This is no particular writ of right upon an ancient right, but a writ of right patent grounded upon a disclaimer, and lies when the tenant does disclaim upon record to hold the land of his lord; as in *replevin*, if the lord avow for rents and services, and the tenant disclaim in his barr to the avowry, the lord loses the services, and judgment shall be forthwith given against him; and then the lord may bring his writ of right for the land. See *Rast. Entr.* 224, 225. The writ removed from the lord's court to the county, thence into the *common pleas*; the count, and the *mise* joined, and the grand assise.—And then the pannel of the grand assise returned by four other persons for want of knights, 225. *b.*

Whene it lies. 4. *Cessavit*. This writ lies where there is lord and tenant, and the tenant pays not his rent and services, but ceases for two years, and there be no sufficient distress upon the land, then the lord may have this writ to recover the land by the statute of *Westminster*, 2. *c.* 21. And it lies where a tenure is created by deed or without deed, and a fee-farm be reserved, if the tenant cease to pay the rent for two years, and no distress be upon the land sufficient, and this by the statute of *Glocester c.* 4 *Vid. F. N. B.* 208. *b. Fr. Co.* 2. *Inst.* 295 *and* 400.*

There must be a tenure in fee. There must be a tenure in fee, or the *cessavit* lies not. *Co.* 2. *Inst.* 296. therefore it lies not against

* 1. R. I. 88. The form of the Writ.

tenant in tail, or for life, *ibidem*. but lies for a tenant for life, as tenant in dower, *per le curtesie*. *F. N. B.* 209. *a.*

Before judgment, after verdict, or default, at the return of the *petit cape*, if the tenant tender all the arrears, and give surety to pay the rent, and perform the services, for the future as the court shall award, he shall be received. This must be done in person, and the sureties bind their lands to the same services. *F. N. B. ibidem. and Co.* 2. *Inst.* 297. *Rast. Entr.* 112. *a.* Tenant to be received, if he tenders arrearages & find sureties.

Vid. the writ, *F. N. B.* 208. Command E that he render, &c. which the same E holds of him by certain services, &c. The Writ.

The tenure is traversable, but not the seisin, *Co.* 2. *Inst.* 296. (134) Tenure traversable.

That he did not cease for two years before the writ purchased, a good plea. *F. N. B.* 209. *a.* Bar. quod non cessit.

Judgment final may be given in this writ. 2 *Inst.* 298. *Rast. Entr.* 112. *a. Keilw. Rep.* 75. *b.*

And it is a good plea that the land was overt and sufficient to the distress of the lord, at the time of the writ brought. *F. N. B. ibidem. Rast. Entr.* 110. See there the count, barr, &c. 110, 111, 112. Barr that the land was liable and overt to sufficient distress.

The process is *Grand Cape and Petit Cape.*

In 35 *E.* 3. there is an original brought in *cessavit* in the court of the county of *Chester*, or county court, by *Robert* the son of *Richard* of *Foulsehurst*, against *John* the son of *Henry Samyn* of an house in *Wico Mabbano*. *Test. Bartholo' Burgesh Justic' Cestr' ix Julii* 35 *E.* 3. Returnable *ad prox' Com' Cestr'*. Cestr. 35 E. 3

The Writ itself is in these words.

Cestr. Writ 35 E. 3.

"His highness *Edward*, the son of the king of England, prince of Wales, duke of Cornwall, and count of Chester, to the sheriff of Chester, greeting: Command *John*, the son of *Henry Samyn*, that justly and without delay he render unto *Robert* the son of *Richard de Foulesharst*, one messuage with the appurtenances in, &c. which *Henry Samyn*, the father of the said *John*, whose heir he is, held of *Richard de Fouleshurst*, father of the said *Robert*, whose heir he is by certain services, and which to the said *Robert* ought to revert according to the form of the statute thereupon provided by the common council of the realm of England, because the said *John* in performing the said services has now for two years ceased as he says, and unless he doth it and the said *Robert* shall make you secure of prosecuting his suit, then summon by good summoners the said *John* that he be at the next county court of Chester, to shew wherefore he hath not done it, and have there the summoners and this writ. Witness *Bartholomew de Bergesh*, our justice of Chester, at Chester 11th day of July, in the 35th year of the reign of our father king Edward."

("Let him recover seisin" at the bottom of the writ.)

Thomas Young, Sheriff of Chester.

(135)

Note. This writ is "Witness the justice of *Chester*," though it be an original writ, which I wonder at; for now they are all—*Witness myself.*

Where it lies.

5. *Escheat*, is a writ for the lord where his tenant dies without heir, that was seised of lands in fee-simple, in such case the lord shall have this writ to recover the land in lieu of his services. *F. N. B.* 143. *Fr.*

And the tenant may die without heir in three cases. 1. In fact, where no person is known. 2dly. In law where the tenant was a bastard. 3dly. In case of feifeiture, where the tenant is attainted of felony. In these several cases there are several writs of *escheat*. For example, in case of bastardy. *Vid. F. N. B.* 144. *a.*

How a man may be without heir in three cases.

" Command A that he render unto B one messuage, &c. which C held of him, and which to the said B ought to revert as his escheat for this, because the said B C was a bastard and died without heirs, as he saith, &c."

The Writ.

If tenant in tail die without heir, then the lord shall not have a *cessavit*, but a *formedon* in *reverter*, but if the remainder in fee be in the tenant in tail, and he die without heir, the lord shall have the *escheat*, because the tenant in tail was tenant to the lord for the feesimple. *F. N. B.* 144. *b.*

Where not a Cessavit but a Formedon.

In case of treason, the king shall have the lands whosoever is lord. *Co.* 2 Inst. 64.

Treason.

Now all tenures are turned into common soccage,* if one commit felony, or be a bastard, &c. *Quær.* to whom the land shall *escheat*, whether to the lord of whom the land was formerly held, and now held in common soccage, or to the king: and I conceive to the lord of whom it is now held in common soccoge, as by paying some rent, or doing some other service, &c. for these rents and services are still preserved by the statute of 12 *Car.* 2. *c.* 24. but if it be not known of whom the land is holden, then the king as the great and chief lord, shall have the land by *escheat*.

All tenures now common Soccage per stat. 12 car. 2. c. 24.

* Estates by inheritance, held in free and common soccage, 1 R. L. 65.

Process. The process in this action is *grand cape* and *petit cape*. *F. N. B.* 144. *b.*

Escheat triable in ejection' firme. The title of lands now by *escheat*, (I conceive) may be tried in an *ejection' firme*; if he who has title enters in due time But if he do not enter of 20 years after, *quær.* if he may not then have this writ, and I conceive he may, for soccage-tenure is a tenure.

Commission for the king. Where the king is to be entitled by *escheat* for felony, there is to issue out a commission to several persons to enquire what lands the person was seised of, of what yearly value, and of whom holden, &c. *F. N. B.* 144. *b.*

By whom may be brought. This writ of *escheat* may be brought by tenant for life of a seignorie, *F. N. B.* 144. *b.*

What. 6. *Medio.* This is where there is lord paramount, *mesne* lord, that is, middle lord, and tenant *peravaile*, that is, the tenant that takes the profits, and the mesne holds of the chief lord, by the same or greater services, (as 20s. rent, &c.) as the tenant *peravaile* holds of the *mesne*, if the *mesne* suffer the tenant to be distrained upon for the rent which he should pay to the chief lord, the tenant shall have this writ against him, and recover his damages, and have judgment against the *mesne* that he shall acquit him. *F. N. B.* 135. *b. Rast. Entr.* 434. *a. Co.* 2. *Inst.* 375.

Where it lies.

The Writ. The writ is, "The king to the sheriff, &c. Command A. that justly, &c. he acquit B of the services which C. requires of him for his freehold, which he holds of the aforesaid A. in I. and whereof he complains that he is distrained for his default, as he can reasonably shew,

that he ought to acquit him, that we may hear no more clamour, &c.

Tenant in tail, in dower, or by the curtesie, may have a writ of *mesne*. *F. N. B.* 136. *a. b.* Who may bring it.

The writ of *mesne* shall not abate by the death of the lord paramount. 4. *H.* 6. 28. *F. N. B.* 136. *b.* Where not to abate.

The process at common law was summons, attachment, and distress infinite; but now by stat. of *Westm.* 2. *c.* 9. summons, attachment, and the grand distress; and if he appear not at the return of the grand distress, (which must have so long time of return as two county courts may be held, so as the sheriff may make proclamation for the *mesne* to appear.) The *mesne* shall be fore judged of his *mesnalty*, *i. e.* he shall lose the service of his tenant, and the tenant shall be only attendant upon the chief lord. *Vid. le stat. W.* 2. *c.* 9. *Co.* 2 *Inst.* 374, 375. See *Rast. entr.* The distress, proclamation, and fore-judger. 434. *b.* (137) Process. Attachment and grand distress per Star. W. 2. c. 9. Forejudger.

Not distrained in his default, is the common plea in this action. *Rast. entr.* 433. *b. F. N. B.* Barr.

For the several sorts of acquittal, *vid Co.* 2 *Inst.* 373.

CHAPTER XV.

SECTA AD MOLENDINUM.

IS a writ that lies for a man when one that owes suit to his mill, that is, that ought to grind his corn at his mill either by virtue of prescription or tenure, and withdraws his suit, then he may compel him by this writ. *F. N. B.* 295. What.

2. This writ is either *Vicontiel*, or may be brought in the *common pleas*, *F. N. B. idem.* Quotuplex.

By whom. 3. It may be brought by a tenant for life or in dower. 296. *F. N. B.*

Process. 4. The process is summons, attachment, and distress, and if he make default after an appearance, a *distringas* in nature of a *petit cape* shall issue, and if he cannot save his default, judgment shall be given against him. *F. N. B.* 296.

(188) Debet and solet. 5. If the demandant have been seised of the suit, then the writ is in the *debet et solet*, but otherwise in the *debet* which savours of the mere right.

View. 6. View lies in this writ of the mill or lands where the mill stands. *F. N. B.* 296.

The Writ is thus.

Original. Command A. that justly and without delay he do suit to the mill of E. of N. in C. which he oweth to it, and hath been used to do, as it is said: and unless he will do it, &c. then summon, &c. *Registr.* 153. *F. N. B.* 23. *a.*

The Count.

Count. Whereupon he says that the said A oweth and was accustomed to do suit to the said mill, for all the corn growing on one hundred acres of land in the same vill, to wit, to the twentieth vessel of grist of all said corn growing; of which suit the same E. was seised by the hands of the said A. as of fee and right in time of peace, &c. by taking the explees to the value, &c. until the said A. for five years before the day of the purchase of the writ of the said E. to wit, on the day, &c. in the year, &c. the said suit withdrew from him, whereby he says that he is injured, and has sustained damage, &c. and thereupon he brings suit, &c. *Rast. entr.* 591. *b. vid. Co. entr.* 641. By prescription against one as an inhabitant within his manor.

The judgment is to recover the (suit) and damages assessed by the jury and costs. *Co. entr. ibidem.* 16, 17, *Eliz.* Judgment.

Pleas in this Action.

The declaration must alledge a seisin of the suit by the hands of the tenant or his ancestors. *Rast. entr.* 591, *b.* Against inhabitants within a manor, the count by prescription. *Co. entr.* Count.

The tenant may plead, that the demandant was not seised by the hands, &c. as, &c. unless by the free will of the said L. &c. *Hors de Son fee is no good plea.* 17 *E.* 3. 64. *Fitz. Abr. Hors de son fee* 22. Barr. (139)

CHAPTER XVI.

A FORMEDON IN GENERAL.*

What.

A FORMEDON is a writ so called, a *forma donationis*, because the form and manner of the gift is set forth in the writ, and is a peculiar writ for an issue in tail, or for him in remainder or reversion, to recover the possession of lands and tenements, or hereditaments, when the estate tail is discontinued, and the remainder or reversion displaced and turned into a right. *Vid. Stat. W.* 2. *c.* 1. *Co.* 1 *Inst.* 327. *F. N. B.* 527, 528.

Is a writ of right in its nature.

2. And this is the writ of right of the issue in tail, for he can have no higher writ. *Co.* 1 *Inst.* 326. *b.* 2. *Inst.* 291. *a.* For tenant in tail cannot have a writ of right *sur disclaimer*, nor a *quo jure*, nor a *ne injuste vexes*, nor a *nuper obiit*, or a *rationabil' parte*, nor a *mortdancester*, nor a *sur cui in vita*, for none but tenant in fee shall have them. *Co.* 1 *Inst.* 327. *b.* But a writ of entry in *casu consimili* or in *casu proviso* he may have. *Co. ibidem.* 512, 514. and some other writs relating to the

* 1 R. L. 44. 61.

seignory, as *cessavit*, *escheat*, *waste*, &c. and the like. *Co. ibidem.*

Quotuplex Descender.

3. There are three kind of writs of *formedon*. 1. In *descender*, to be brought by the issue in tail, who claimeth by descent *secundum formam doni*. 2. In the *reverter*, for him in reversion after the estate tail spent. 3. In the *remainder*, for him in the remainder, his heirs or assigns after the determination of the estate tail, or other particular estate upon which the remainder depended. *Co. 1 Inst. 326. b.*

(140)

1. The first of these is given by the statute of *W. 2. c. 1. de donis conditionalibus*, and the form is there set down. *Co. 2. Inst*, 336. *pl. com.* 240. But at common law in one special case there was *Formedon in descender*. *Vid. Pl. Com.* 234. *b.*

Reverter.

2. The second in *reverter*, lay at common law after the determination of the estate tail, which was then an estate in fee simple conditional. *Pl. Com.* 235. *a.*

Remainder.

3. The last, in *remainder* was before at common law, in some cases, as upon an estate for life, but not upon an estate tail, because no remainder could be limited upon it at common law because it was a fee simple; but after the statute a remainder may. *Co. 2 Inst. ibidem.*

4. To prevent deceits between the demandants and tenants that the rights of strangers might not be lost, proclamation anciently was made before judgment, upon confession or default in a *formedon*. 33 *H.* 6. 34 *a.* and that remarkable case. 7 *H.* 4. 19. *b. Fitz. abridg. tit. proclam.* 14. *Br. 2. pl com.* 358. *a.*

CHAPTER XVII.

Of Formedon in Descender.

1. THIS writ is given by the statute of *W.* 2. *c*, 1. and lieth where a gift is made to a man and the heirs of his body begotten, or to a man and a woman, and the heirs of their two bodies begotten, or where any other estate tail is made or limited, and the donee being seised, alieneth the lands by feoffment, &c. or disseised of them dieth, his heir shall have this writ of *Formedon* to recover the lands given in tail. *F. N. B.* 527. What.

2. At the common law, that which is now by the said statute called an estate tail, was a fee simple conditional, and before issue had, the donee might have aliened by feoffment, and have barred his issue, but not the donor or his heirs, but after issue he might have aliened, and barred both his issue and the donor forever. *Co* 2 *Inst* 333. *pl com. Beverley's case. Co* 1 *Inst.* 19 *Lit Sect* 13. At common law the issue might have had a *Mortdancestor Pl. Com* 239. *b.* Tail. Fee-simple at common law. (141)

3. Now by the statute of *W.* 2. it is provided, "that those to whom tenements were so given upon condition, shall not have the power of aliening the tenements, so given, whereby the tenements may the less remain to their issue after their death, or may revert to his heirs (if issue should fail)" W. 2.

4. And in case of such alienation, the same statute has set down the form of the writ for the issue in tail, i. e. this *Formedon in descender:* where the alienation was by feoffment whereby the estate tail was discontinued; (which discontinuances were not by construction of law restrained by the words *potestatem alienandi*, for many sound and excellent reasons) which you may read in *Co.* 1 *Inst.* 327. *a. b. Co.* 2 *Inst.* 335. But in some cases, alienations Form of the writ by stat. W. 2 in case of alienation.

may be avoided by action, entry or claim, at the election of the issue in tail, and some are merely void. *Co.* 1. *Inst.* 327. *b.*

Only in one case it is said, a *Formedon in descender* lay at common law. *Vid. Pl. Com.* 239. *b. Lord Barkley's case.*

Original.

The writ is thus :——

" The king to the sheriff, &c. command A that, &c. he render to B the manor of N, with the appurtenances which C gave to D, and E, his wife, and the heirs of the bodies of them the said D and E issuing, and which after the death of the aforesaid D and E ought to descend to the aforesaid B the son and heir of the aforesaid D and E, by the form of the gift aforesaid, as he saith, and unless, &c. *F. N. B.* 212. *c.*

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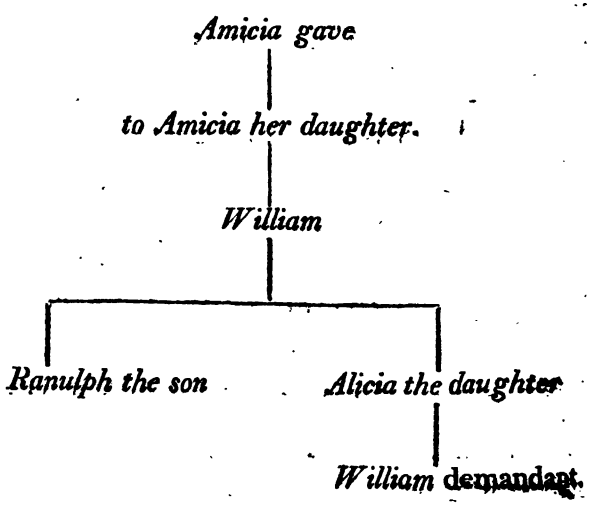
Defcent.

This writ is for the first and immediate issue in tail, when land is given to a man and the heirs of his body. There are other forms according to the particular case of the demandant, which you may see in the *register*.

Pedigree.



If lands be given by the first *Amy* to *Amy* her daughter and the heirs of her body, and *Randle* is last seised, and dies without issue; now the last *William* has a title to the land, as heir to his uncle *Randle*: The *formedon* is thus—As by a writ 34 *E.* 3. *In Castr. Cestr. coram justic. Cestr.*

" Edward, &c. Prince of Wales, Duke of Cornwall, and Count of Chester, to the sheriff of Chester, greeting: command William the son of Richard del Hogh, that justly and without delay he render to William de Hatton one messuage and ten acres of land with the appurtenances in Wistaston, which Amicia de Wistaston gave to her daughter Amicia, and to the heirs of her body to be begotten. And which after the death of the said Amicia the daughter of the said Amicia, and of William the son and heir of the said Amicia, the daughter of Amicia, and of Ranulph the son and heir of the said William the son of Amicia, and of Alicia the sister of the said Ranulph, ought to descend by the form of the gift aforesaid to the said William Hatton the son of the said Alicia, and next of kin, and heir to the said Ranulph, as he saith: and unless he doth it, and if the said William de Hatton shall make you secure of prosecuting his claim, then summon by good summoners the said William the son of the said Richard, that he be at the next county court of Chester, to shew wherefore he hath not done it. And have there the summoners and this writ. Witness, Bartholomew de Bergher, our justice of Chester, at Chester, the 22d of October, in the year of the reign of king Edward my father, the 34th. Chester original. E. 3.

Pledges to prosecute { Hugh de Boydhull. / Robert Cote."

"Thomas le Young, sheriff of Chester, to the said writ answereth, that the said writ came so late that it could not be executed."

Then a voucher is indorsed thus, *viz*———

" The tenant comes and vouches to warranty Charles the son and heir of Richard del Hogh, and he hath it, &c."

Demandant must be heir to him last seised.

1. *Note*, In this writ of *Formedon* for a rule that the demandant must always make himself heir to him who was last seised, as you may observe by this writ, *Alice* the mother was never seised, and therefore he makes himself heir to his mothers brother. *F. N. B.* 530. *Engl.*

The last seised to be named son and heir.

2. *Note*, That the ancestors that were seised, must be named in the writ, and named (son and heir) *F. N. B.* 528. as by this writ, but if any were not seised, such need not be named (son and heir) or (sister and heir) as if the eldest son die before any entry, he need not be named (son and heir) as here *(Alice)* in this writ is not named heir, *F. N. B.* 529. *Buckmeir's Case. Co Lib.* 8. 88. *b.*

He never seis'd needs not to be named.

3. Such as were never seised, nor right descended to them, as if the eldest son die before the father, without issue, need not be named at all. *Co. ibid.* 46 *E.* 3. 9.

Clause (eo qd) not in this writ.

4. *Note*, The clause *(Et qu' post mortem)* brings in the descent; but in this writ there is no clause *(Eo quod, &c.)* but that is only proper when the estate-tail is spent in a *Formedon* in remainder or reverter. *Co. ibid.*

Process.

The process is *summons, grand cape* before appear-

ance, and *petit cape* after appearance. *Rast. Entr.* 368. *b.* 369. *a.*

Upon the return of the *grand cape* the tenant may wage his law of *non-summons* for which and the manner of proceeding, see before *default*, *grand cape*, *petit cape*. *Rast. Entr.* 368. *a.* (144)

Upon the return at the day of appearance upon the original the tenant may essoin. *Vide antea essoin.* Essoin.

At the essoin-day the tenant ought to appear, or a *grand cape* is awarded against him. *Vide Rast. Entr.* 369. *a.*

Upon the tenant's appearance the demandant ought to count: and the count is as various as the writ, according to the particular circumstances of the case; but according to the case of the writ herein before mentioned, the count ought to be thus, *viz:* When to count

" William de Hatton demands against William the son of Richard del Hogh one messuage, &c. which Amicia de Wystaston gave to Amicia her daughter, and to the heirs of her body to be begotten, and which, &c." (as in the writ till " as he saith".) " And whereupon he saith that Amicia de Wystaston gave the said messuage and ten acres of land with the appurtenances to the said Amicia her daughter, and the heirs of her body to be begotten, in form aforesaid. By virtue of which gift Amicia was seised of the messuage and ten acres of land aforesaid with the appurtenances in her demesne as of fee and right according to the form, &c. in time of peace, &c. in the time, &c. by taking the explees to the value, &c. And from the said Amicia de Wystaston descended the right, &c. with the appurtenances, according to the form, &c. to a certain William as son and heir of the said Amicia the Count.

daughter of Amicia, and from the said William descended the right &c. with the appurtenances according to the son &c. to a certain Ranulph, as son and heir of the said William, and from the said Ranulph descended the right, &c. according to the form, &c to the said William who now claims as next of kin, and heir to the said Ranulph, to wit, as the son of the said Alicia the sister of the said Ranulph the son of the said William the son of the said Amicia the daughter of the said Amicia de Wystaston, and which after the death, &c. And thereupon he brings suit, &c.

He never feised not named heir.

Note here, that it appears by the writ, that *Alice* was never seised, because she is named (sister of Ranulph,) and not (sister and heir,) therefore the count must make the demandant heir to *Ranulph*, who was last seised, and the right descend from him, because he was the person that made the discontinuance, or was disseised, or after whose death an abatement was made by the tenant; for by the writ it appears all were seised but *Alice*, for they are all named (son and heir) *Vid. Rast. Entr.* for the counts in *Formedon en Descender.* 365. *a, b. Co. Entr.* 326, 327, 328.

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Defcend' jus' Tnough the anceftor died feifed.

Note, it is said in the count always that the right descended, though the ancestor died seised, as from B the right descended to C, from C the right descended to N, and from N the right descended to the demandant as son and heir &c. *Co. Entr. ibidem.* The reason of this is (as I conceive) because it is not material whether the ancestors after the first were actually seised or not, so as a right did descend, and the demandant make himself heir to him who last died seised, or to whom the right did last descend.

Who had never any right defcended, needs not be named.

But that ancestor who never had any right de-

scended to him, needs not be mentioned in the writ or count. Example.

As suppose there be grandfather, father and son; and the grandfather aliens, and the father dies in the life of the grandfather, and the son is to bring his *formedon:* he may say in his writ thus.—— "And which after the death of A and of B, the son and heir of A ought to descend to the said C the son of L the son of B the son of A as next of kin and heir to the said B. And not—which after the death of A and B the son and heir of A and L the son of the said B the son of A ought to descend to the said C the son and heir of L the son of B and heir of A—So in the count L the father may be left out thus. And from A the right descended to B as his son and heir, and from B the right descended to C the now demandant as next of kin and heir to said B to wit, the son of L the son of B the son of A."

Note, the demandant may have one *formedon* upon several gifts, *Cr.* 2. *P.* 329. Stat. of limitation. 32 H. 8.

When the limitation of this action and all other *formedons* were 50 years by the statute of 32 *H.* 8. in the count, when they came to the ancestor that was seised within the 50 years, it is sometimes counted thus.—— "And from the said A the right descended &c. to B which said B was seised of the said tenements with the appurtenances in his demesne as of fee and right in time of peace in the time of Henry the eighth within fifty years last past, by taking thereof the explees &c. *Co. Entr.* 325, 326. &c." Stat. 21 Jac. c. 16. of limitation.

Now the limitation is within 20 years next after the title accrued, by the statute of 21 *Jac. c.* 16. (146)

After the count the tenant may imparle, and af- Imparlance, View.

ter imparlance, demand view, which at *Chester* is but *de die in diem*, but at *Westminster*, nine returns between the *Teste* and the return, *Co.* 2 *Inst.* 567. *Dyer* 252. *Dyer* 210. *Vid. View antea Rast. Entr.* For the return days of mesne process now, *Vid.* 16 *Car'* 2. *c.* 6.

Essoin after view.

And upon return of the writ of view, the tenant may be essoined again. *Vid. essoine antea f.* 19. And the demandant must adjourn the essoine 15 days at *Westminster*, but in *Chester*, but one day.

Aid, voucher.

Aid, voucher, receit, lies in this action, and all other *formedons*.

Judgment.

The judgment is——"Therefore it is considered that B recover his seisin against the said C of the messuage &c. with the appurtenances, and the said C in mercy &c.

I shall conclude this chapter with a record in the time of *H.* 5. in the court of the county before the justice of *Chester*, wherein you have the voucher of one within age, a counterplea, a waver of a counterplea, and then the trial of the age by inspection of the court, according to the rules before *f.* 53. and 65. And one other record in the time of *H.* 4.

Record.

At the county court of Chester before Gilbert Lord de Tolbot justice on Wednesday next, after the feast of St. Lucie the virgin in the year *H.* 5. 3.

Chester ss. William Brereton knight demands against Nicholas the son of Roger de Mouldworth, one messuage, one ox-gang of land, and one half acre of meadow, with the appurtenances in Tervin, which Simon de Blasten and Johanna his wife, gave to William de Brereton the elder, and Roesie his

Count.

wife, and the heirs of the bodies of the said William and Roesie to be begotten &c.

Infant voucher

And the said Nicholas in his proper person comes and defends his right when &c. and vouches thereof to warranty John de Huxley and Hellen his wife next of kin, and heirs to Margery who was the wife of the said Nicholas whose heir she is, to be summoned to the said county court, by the aid of the court &c. to warranty against him &c. which said Hellen is under age &c. And he prays that the said plaint may remain without day until the full age of the said Hellen, &c.

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Counterplea of voucher.

And the said William saith that the said Nicholas to this voucher to warranty ought not to be admitted &c. Because he says that the said Hellen or any of her ancestors have had nothing in the said tenements with the appurtenances in demesne in service nor in reversion before the day of the purchase of the writ &c. And this he prays may be enquired of by the country and the said Nicholas doth the like &c. (The venire is continued by *vice comes non misit breve*, and then upon the return of the venire the demandant waves his counter-plea and admits the voucher thus.) And the said William by his attorney aforesaid, relinquishes his verification aforesaid, and admits the voucher aforesaid, but says that the said plaint ought not to remain because he says that the said Hellen is of full age &c. And he prays that the said Hellen may be inspected by the court here &c. Whereupon it is commanded the sheriff that he cause the said Hellen to come before the said justice here, at the next county court, that by the inspection of her body it may be determined by the court here whether she be of full age or not &c. The same day is given to the parties aforesaid there &c *The venire is continued by* vice comes non misit breve *till*

Inspection

the county court &c. At which day came the parties aforesaid &c. and also the said Hellen in her proper person and by inspection of the body of the said Hellen here in court by the justice and *jurors* of the said court, it is considered that the said Hellen is of full age &c. therefore &c. *Then goes out a summons ad warrantizandum.*

Found of full age.

Record 8. H. 4. Cestr.

There is another remarkable record in the 8th of *H.* 4. where in a *formedon* in the *descender* the tenant vouches, and the vouchee summoned, and process to the *(sequatur sub suo periculo)* and he appears, vouches over with the like process, and the second vouchee appears and vouches over a third: which voucher is counterpleaded, and the return of the *venire* waved, and then process against the third vouchee, as before the record in part hereafter follows, for the whole record is a long roll, but what is material I shall set down in *hæc verba.*——

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As yet of the pleas of the county court of Chester at Chester, before Gilbert lord de Talbott, Justice of Chester, of Wednesday next before the feats of the nativity of the blessed virgin Mary, and in the 8th year of the reign of King Henry the ofurth, since the conquest.

Chester, ss: Richard Chalons. by his attorney, demands against Robert Browe, eight messuages, fourteen oxgangs of land, two acres of meadow, sixty acres of pasture, four pounds, two shillings and seven pence, one farthing of rent, with the appurtenances in great Crystilton, little Crystilton, Rowe Crystilton, great Cotton and little Cotton, which Philip de Valla Corto gave to John the son of John Chalons, and the heirs of the body of the said John the son of John to be begotten; and which

after the death of the said John, the son of John, and John the son and heir of the same John the son of John the son of John and of Robert the son and heir of the same John the son of John the son of John, ought to descend according to the form of the said gift to the said Richard the son and heir of the said Robert, the son of John as he saith; and whereof he saith the said Philip, &c.

And the said Robert, by John Love, his attorney, comes and defends his right when, &c. And as to all the tenements aforesaid except the third part of one acre of land with the appurtenances of the same tenements, vouches to warranty Thomas de Wilbraham, his chaplain, by the aid of the court in the county, aforesaid, &c. And as to the the said third part *(pleads non dedit)*. And of this he puts himself upon the country; and the said Richard likewise. Therefore the sheriff is commanded that he cause to come here at the next court, to wit, on Wednesday next after the feast of St. Michael the archangel, twelve, &c. by whom, &c. And who neither, &c. to recognize, &c. because as well, &c. And the said Richard says that the said Thomas whom, &c. had nothing in the tenements aforesaid after the title of the said John the son of John. And this he prays may be inquired of by the country; and the said Robert likewise, &c. Therefore the sheriff is commanded that he cause to come, &c. At which day came the parties aforesaid, by their attornies aforesaid, here, &c. and hereupon the said plaint among others, is adjourned, &c. to this day here at the next county court, to wit, until Wednesday next after the feast of the conception of the blessed virgin Mary, by the common adjournment hitherto in the said county court, from time whereof the memory of man runneth not to the contrary used, &c. The same day is given to the parties aforesaid, there, &c. At which day came the parties afore-

Voucher.

Plead non dedit as to the 1-3 part.

Counter-plea of Voucher.

Venire.

Adjournment.

said, here, &c. And hereupon the said plea, &c. *(adjourned as before)* at which day came the parties aforesaid, &c, and hereupon the said Richard freely grants that the said voucher to warranty stand, &c. Therefore the said Thomas Wilbraham, (149) vouched to warranty, is summoned by the aid of the court, &c. in the said county that he be here at the next county court, to wit, on Wednesday next before the feast of St. Matthew the apostle, to warrant, &c. And likewise the said jury, as to this, inasmuch as the said parties have above pleaded to the country, is put in respite here, until at the said county court, &c. by default of jurors, because none came. Therefore let the sheriff have the bodies, &c. the same day is given to the parties aforesaid, there, &c. At which day comes as well the said Richard as the said Robert by their attornies, aforesaid, here, &c. and the sheriff now returns that the said Thomas hath nothing, &c, And hereupon it is sufficiently testified that he hath sufficient, therefore as before he is summoned that he be here at the next county court, to wit, on Wednesday, &c. to warrant in form aforesaid. And likewise the jury aforesaid is continued until this day here at the same county court, according to the custom of the said county court, from time, &c. The same day is given to the parties aforesaid, here; at which day comes as well the said Richard as the said Robert, &c. And the said sheriff now returns that the said Thomas hath nothing. &c. And hereupon it is testified here that he hath sufficient, Therefore he is summoned, as he hath oftentimes been summoned, that he be here at the next county court, to wit, on Wednesday next after the feast of the Holy Trinity to warrant in form aforesaid. And the said Robert is informed that it issues at his peril, &c. And likewise the jury aforesaid is continued, &c. At which day comes as well the said Richard, &c. And the said Thomas summoned, &c. being solemnly called,

Summons to Warranty.

Habeas corpora juratorem.

Sequatur sub suo periculo.

casts his essoine *de malo veniendi* against the said Richard in the plea aforesaid. And he hath thereupon day by his essoin here, until the next county court. &c. And likewise the said jury, &c. the same day is given to the parties, aforesaid there, &c. At which day comes as well the said Richard as the said Robert and Thomas, by their attornies aforesaid, here &c and likewise the jury comes as to this, inasmuch as the same Richard and Robert have above plead to the country, here, &c. And hereupon the same Richard challenges the array of the pannel, &c. *(challenge for affinity between Jahn Le Mainwaring the sheriff, and the wife of the tenant, which was confessed and the pannel quashed and process is awarded to the Coroner of Broxon hundred returnable at the next county court)* And hereupon the said Thomas freely warranteth to the said Richard the tenements aforesaid, except the third part aforesaid, above excepted, &c. and vouches over, thereupon to warranty, &c Robert Madover, clerk, by the aid of the court, &c. And to be summoned in the same county, &c. Therefore he is summoned that he be here on the said Wednesday next after the feast of St. Michael, the archangel, &c. the same day is given to the said parties, there, &c. At which day comes as well the said Richard as the said Robert and Thomas, by their attornies aforesaid, here, &c. And the sheriff now returns that the said Robert Madover hath nothing, &c." And then goes on against the second vouchee to *Sequatur sub suo periculo*, and till essoin and appearance as before. And the second vouchee appears, and vouches over a third vouchee with the like process and proceedings.

Vouher. Essoine.

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Voucher over.

This record evidences the learning and rules concerning the process in voucher, and how a deed of vouchers may be managed to delay the demandant, for every vouchee may wave appearing till the return

of *sub suo periculo*, if he be be not returned summoned before. *Vid. fol.* 63. *and* 51, 52.

For pleas in *Formedons. vid.* at the close of *Formedon in Reverter.*

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CHAPTER XVIII.

Formedon in Remainder.

What.

1. *A Formedon in remainder*, lies where a gift is made in tail or for life, remainder in tail, or in fee, an ! the tenant in tail or for life alieneth or is disseised, and dieth without issue, he in remainder shall have this writ. *F. N. B.* 542.

Grounded upon equity, Stat W. 2.

2. This writ is partly grounded upon the equity of the statute *de donis conditionalibus*, for no *formedon in remainder* is expresly given by that statute, but the remainder man upon an estate-tail being in the same mischief with the issue in tail, equitable construction hath all times ever since brought the remainder man within the same remedy. *F. N. B.* 543. but for a remainder upon an estate for life (some are of opinion) a *formedon* in remainder lay at common law; but *quær.* for at the same parliament that the stat. *de donis conditionalibus* was made, the statute of *W.* 2 *c.* 24. was made, which wills, that as often as it happens in *chancery* that in one case a writ is found, and in the like case falling under like law, and requiring like remedy there is none found, the clerk in chancery shall devise such writ*. And upon this statute the writ of entry *in consimili casu* was grounded, which was a writ for him in reversion or remainder after an estate for life, to recover his reversion or remainder, when the tenant for life aliens in fee or in tail; and consequently it seems to appear, that before this statute, such remainder man had no remedy in the life of tenant for life; but yet after the death of tenant for life, I see no reason but he might have had this *Formedon in remainder*, or the writ of entry at common law.

Where a formedon lay at common law W 2 c. 24. * 2. R. L. 82.

Entry in consimili casu.

Entry ad communem legem.

However, now at this day, if the tenant for life alien, he in remainder seldom or never brings either his writ of entry in *consimili casu* in the life of the tenant for life, or his *formedon* after his death, or writ of entry at common law, but enters for the forfeiture, and brings his *ejectione firmæ*. But *quere* if the alienee of the tenant for life die seised before the entry of him in remainder or reversion, whether their entry be not taken away at this day? but of this hereafter when we come to the writ of entry in *consimili casu*. *vid Co.* 2 *Inst.* 309.

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Q. Entry taken away at this day.

The writ of *formedon in remainder* follows.—

Original.

" The king to the sheriff, &c. command A that, &c. he render to B one messuage, twenty acres of land, &c. which C gave to D and to the heirs of his body issuing, so that if the said D should die without heirs of his body issuing, the aforesaid messuage and twenty acres of land with the appurtenances, should remain to the aforesaid B and his heirs, and which after the death of the aforesaid D, ought to remain to the aforesaid B by the form of the gift aforesaid, because the aforesaid D died without heir of his body issuing, as it is said, and unless, &c. then summon, &c." *F. N. B.* 218. 1. *b. Registr.* 243.

This writ varies according to the case, as the other, the various forms you may see in the register.

Remainder executed,

Note, if a *remainder* be once executed, that is to say, if the remainder man be once seised of the estate-tail in possession, and right descend to the heir, the heir shall never make mention of the remainder, but shall have the general writ of *formedon in descender*, for it is a rule in the register, that writs never make mention of the remainder when the writ is in the descender. For example, A gives lands to B in tail, remainder to C in tail, B dies without issue, C enters and aliens in fee and has issue D.

Formedon in Descender.

There's another rule in the register, that if the ancestor in remainder were never

feized, it shall never be said descendere debet ut filio & hered', but remanere debet Co lib. 8 f. 89. a Buckmers case.

D shall not have a *formedon in remainder*, because C his father was seised, and the right descended to him, but he shall have the general writ of *formedon indescender*, which shall be thus, *viz.*

Original.

" Command, &c. which A gave to C, and the heirs of his body to be begotten and which after the death of the said C, ought to descend to the said D as son and heir of the said C, as he saith &c." *Registr.* 244. *Co. Lib.* 8. *Buckmer's* case, 88, *a*, *F. N. B.* 546. *b*.

All precedent remainders to be named.

But a demandant in a *formedon in remainder* ought to make mention of all the precedent remainders in tail. *Co. ibidem.* But *quær.* whether all that were seised in the precedent remainders need to be named, *viz.* the issues of the remainder men; I conceive not, no more than the issues of the donee in a *formedon in reverter* this *Q.* is put by *Dyer.* 216. he needs but to say, *Eo. quod, &c.* the precedent remainder died without issue.

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Process.

The process and proceedings are the same with the *formedon in descender*, both before and after appearance.

Count.

The count is various according to the writ, but the general count according to the writ before mentioned, is thus.——

" B by I S his attorney demands &c. whereupon he saith that the said L gave the messuage &c. with the appurtenances to the said M and the heirs of his body to be begotten so that if the said M should die without heirs of his body begotten, the messuage aforesaid with the appurtenances, should remain to the said B and his heirs. By virtue of

which gift the same M was seised thereof in his demesne as of fee and right according to the form &c. in time of peace &c. by taking &c. And from the said M because he died without heirs of his body begotten, the right hath remained &c. according to the form &c. to the said B who now demands &c. And who after the death &c. and thereupon he brings suit &c." *Rast. Entr* 369 *b.*

This is a declaration where the right fell upon him in the remainder named in the gift, and the *formedon* is brought by him.

If the *formedon* be brought by the heir of him in remainder, or by the son and heir of the heir, it is thus.——"And from the said M. because he died without heirs of his body begotten, the said right remained to N, and from the said N the right remained according to the form &c. to the said B as son and heir &c." *Rast. Entr.* 369. *b.* Count.

In the precedent in *Rast. Entr.* 369. *b.* The count concludes, and he produces here in court a certain writing under the names &c. which attests the said gift and remainder &c. which needs not be done in the count, but a deed must be shewn if *Oyer* be demanded by the tenant, but the count shall not mention the deed. *F. N. B.* 546.

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View, voucher, aid, &c. and the same proceedings are in this writ as in the *formedon in descender.* And now we come to the *formedon in reverter.* View, voucher, aid.

The reason why none of the issues of the precedent remainders need to be named in the writ or count (as I conceive they need not) is because it stands upon the same reason with a *formedon in reverter*, where the issues of the donee need not be named, for the remainder man's title depends upon Vid. antea & postea, who shall be named in the Pedigree.

the precedent remainder dying without issue, as his in reversion upon the donees dying without issue; and therefore needs but to say, *Eo quod præd. D. obiit sine exitu. &c.*

CHAPTER XIX.

Formedon in Reverter.

Where it lieth.

1. A *Formedon in reverter* lieth where the donee in tail or his heirs dieth without issue, then the donor or his heirs may have this writ, or if the donor or his heirs grant the reversion in fee, or the donee or his heirs die without issue, then the grantee or his heirs may have this writ. *F. N. B.* 546. *Dyer* 125

Speical writ in remainder.

2. But if the reversion be granted in tail, then the donee dies without issue, and a stranger abates, the grantee shall have a special writ in remainder, because the reversion is in another person, *i. e.* the first donor *F. N. B.* 544.

Lay at common law.

3. This writ as hath been said lay at common law,

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The writ is as followeth, viz.

Original.

"Command A that, &c. he render to B one messuage and twenty acres of land with the appurtenances in G, which C the father of the aforesaid B whose heir he is, gave to I, and E his wife, and to the heirs of their bodies issuing, and which after the death of the aforesaid I and E ought to revert to the aforesaid B by the form of the gift aforesaid, because the said I and E died without heir of their bodies issuing, as he saith, and unless, &c. *F. N. B.* 219. *b.*

Who are not to be omitted in the pedigree.

Note, in this writ none of the ancestors of the donor that were seised of the reversion, or to whom a right to the reversion descended, are to be omitted

in the pedigree: and therefore the omission of the eldest son who survived the father, shall abate the writ, as for example, if there be grandfather, father and son, and the grandfather gives land to B in tail, and the grandfather dies, and then the father dies, and then B dies without issue, and a stranger abates, the son in his *Formedon in Reverter* must say, "And which after the death of B to the said C the son and heir of L, the son and heir of L, the son and heir of M (the grandfather) ought to revert according to the form, &c inasmuch as the said B hath died without heirs of his body begotten. *Co. Lib.* 8. *f.* 88. *Buckmer's case.*

On the part of the Donee none of the issues need to be named in the Writ or Count.

But on the part of the donee, the demandant need not name any of the issues in tail, in the pedigree, either in the writ or count, but shall say, "and which after the death of B, the donee, to her ought to revert, because the said donee died without, &c. *Co. ib.* Yet if he will take upon him to name them, he may or any of them, as in the count in *Rast. Entr.* 375. *a.* where it is said, inasmuch as the said M, (the son of the donee) died without issue, &c. But quere whether that be good; for according as the law is said to be in *Dyer* 14. and *Co. Lib.* 8. *Buckmere's case*, it should be no good count; for though the son be dead without issue, yet it is possible the estate tail is not spent, for the donee might have other sons alive according to these books, and therefore he ought to have said, Eo quod, the donee died without issue, *Dyer* 216. *pl.* 56. 16. *b.*

Count.

The Count is thus.

"I M, in his proper person, demands against C one messuage, &c. and whereupon he says that the said T the grandfather of the said I M, &c. was seised of the said tenements with the appurtenances in his demesne, as of fee and right in time of peace, &c. by taking, &c. And being so seised after-

wards gave the tenements aforesaid, with the appurtenances, in form aforesaid to the said H and the heirs of his body to be begotten By virtue of which gift the same H was seised thereof in his
(156) demesne, as of fee and right according to the form, &c. in time, &c. by taking, &c. And from the said H inasmuch as he died without heirs of his body begotten, the right remained, by the form, &c. to the said W W and the heirs of his body to be begotten. And from the said W W inasmuch as he died without heirs of his body begotten, the right reverted &c. according to the form, &c. to the said I M who now demands as next of kin and heir to the said T, to wit, as the son of I the son of that T. And which after the death, &c. And thereupon he brings suit, &c." *Rast. Ent.* 375. *a.*

This count is for the grandchild of the donor where a gift is made in tail, remainder in tail, and both die without issue.

Note by this count the father never had any right descended to him, because the demandant makes himself heir to his grandfather.

Explees both in donor and donee.

Note for a rule in the count, in a *formedon in reverter*, the *explees* must be alledged both in the donor and donee, as you may see by this count. *F. N. B.* 549.

Process.

The process and proceedings are the same with other *Formedons;* Now in regard these actions do sometimes happen at this day by discontinuances of estates-tail, by fines and feoffments, &c. I shall here at least give some light how long these actions may be regularly delayed before any judgment can be given in them, which is much for the advantage of the tenant, who ordinarily desires to keep the possession as long as he can; yet this cannot always

be delayed alike, because the circumstances of the case may not admit it, for he that may vouch or pray in aid, &c. may delay the cause much longer than he that has no ground for a voucher, &c. And he that may have a foreign voucher, in a particular jurisdiction, more than he that has only cause to vouch within the jurisdiction of the court, &c.

Vid. for pleas in formedons. f. 184.

CHAPTER XX. (157)

Proceedings in a Formedon, how they be managed and delayed

1. Upon the original, the tenant's attorney may essoin at *Westminster*, 15 days. 1 day in *Chester*. 1. Essoin.

2. If there be no good summons, and a *grand cape* issue for want of an appearance, that delays the demandant two terms according to the statute of 16 *Car.* as if the original be returnable *tres Michælis* the *grand cape* is returnable on the morrow of the purification, from the 20th. of *October* to the 3d. of *February*.————15 *Weeks*. How formedons may be managed. Grand cape.

At *Chester*, the *grand cape* is returnable the next day after the return of the original, or any other day in the assise week; but the sheriff (if he pleases) may delay the demandant and favour the tenant by his return, by returning a *tarde* upon the *grand cape*, because of the shortness of the time; and so the demandant in *Cheshire* may be delayed.————————6 *Months*. Chester delays Grand Cape.

3. At the return of the *grand cape*, the tenant may wage his law of non-summons, and then he shall have day to make his law some day in term, 15 days at least, or it may be to another term, for these are days of grace.————————15 *days*. 3. Law wager of non summons.

Chester. At *Chester*, day to wage his law is sometime in the same session week.

View. 4. After appearance, the delays may be thus; after the demandant hath counted, the tenant may demand the view, or upon *Oyer* of the writ. And that delays the demandant at *Westminster*, two terms at least, *i. e.* nine returns.——————2 *terms.*

(158) Chester. At *Chester*, the writ of view is commonly returnable the next sessions.——————6 *Months.*

5. Essoin after View. 5. At the return of the writ of view, the tenant may essoin, and that gains 15 days more at *Westminster.*——————15 *days.*

Chester. At *Chester*, 1 day.——————1 *day.*

6. Count de novo. 7 Imparlance. 6. At the day given by the essoin, the demandant counts *de novo*, and the tenant is then called to plead, and then the tenant may imparle generally or specially, and that is to some day in term, or to the next term, at the pleasure of the court, for they are days of grace.——————15 *days.*

Chester. At *Chester*, the day given by the imparlance, whether general or special, is some day in the sessions week, or to the next assises, at the pleasure of the court, but commonly day is given to the next assises, which delays——————6 *Months.*

Note, that view may be granted either before or after a special imparlance.

8 Voucher. 7. At the day given by the imparlance, the tenant must plead or vouch; by the voucher the tenant at *Westminster* is delayed nine returns more, for the summons *ad warrantizandum* must have such return, *viz.* if it be *test octab. purificationis*,

it must be returnable *tres Trinitatis* which will be two terms more.——2 *terms. 5 Months.*

At *Chester*, it is returnable at the next session unless in common recoveries,——6 *Months.* Chester.

8. At the return of the summons *ad warrantizandum*, if the sheriff return *(nihil)* the tenant may have an *alias summons ad warrantizandum*, and that gains at *Westminster*,——15 *Weeks.* 9. Summons ad Warrantizandum.

At *Chester*, the *alias* is returnable some day in the session week. Chester.

9 At the return of the *alias* and *nihil* returned, issues out a *pluries summons* which gains——15 *weeks.* 10. Al. & plur.

At *Chester*, the *pluries* is returnable some day in the assise week if the time will permit, otherwise *pro prox' &c.* Chester. (159)

10. At the return of the *pluries* if a *nihil* be returned issues out a *pluries* with a *sequatur sub suo periculo*, which at *Westminster* gains 15 weeks more.——15 *Weeks.* 11. Sequatur sub suo periculo.

At *Chester*, *pro prox'*——6 *Months.* Chester.

11. At the return of the *sequatur*, if the sheriff return the vouchee summoned, the vouchee may essoin 15 days.——15 *days.* 14. Essoin pro vouchee.

When the vouchee appears, the tenant may essoin, *Hob. Rep.* 46. Tenant essoin.

At *Chester*, 1 *day*——1 *day.* Chester.

12. At the day given by the essoin, the deman- 13. Count de Novo.

Imparlance per voucher

dant counts *de novo*, and the vouchee may imparle as the tenant before.

14 Vouchee over.

13. At the day given by the imparlance, the vouchee *must* plead or vouch over, &c. both at Westminster and Chester.

15. Venire facias.

After issue joined, then is awarded the *venire facias*.

I have observed the course of the process, how long the demandant may be delayed before he can bring the action to an issue where there is but one tenant, and in the ordinary course where there is but one voucher, but if there be many tenants and vouchers to be vouched over, it makes the delay possibly as long as the parties live, though the suit continue many years, and if one tenant dies, the writ in all *præcipes* is abated. But by this that hath been said, it appears that in all these actions at Westminster, and all other *præcipe quod reddats*, (except writs of dower *unde nihil habet*) the demandant may be delayed at least a year and an half before the cause can be brought to issue, but at Chester much longer.

And if the tenant be an infant the cause may be delayed till he comes of age.

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CHAPTER XXI.

Delays in Chester in these Actions.

Delays in Chester

1 ORDINARILY the tenant cannot avoid an appearance at the next sessions, when the original writ is returnable, because he can but essoin from the first day until the second, to wit, from Monday until Tuesday; but after an appearance, has two rules to plead, in nature of imparlances, which are only *de die in diem*, unless the court gives further time,

Essoin, & Appearance Imparlance.

which commonly upon a special imparlance is till next sessions, *pro prox.*

2. The common rules to plead are thus,—if he be called to plead upon *Tuesday*, the rule to plead is before the first Wednesday, and then upon *Wednesday* another rule, before the second Wednesday or before the first Thursday, at the pleasure of the court, after these rules are out, in strictness of practice the tenant cannot have any further imparlances. 3. Rules to plead in Chester.

3. But upon *Thursday* mornings court, he may demand the view, and then the writ of view is made returnable Friday or Sunday (as it may be) but is commonly not returnable till the next sessions *pro prox'*, that the demandant may shew the land to the sheriff, otherwise he may be delayed by the sheriff's return by a *tarde*, &c. so here is 6 months gained by the tenant.——————6 Months. 4 View.

4. At the next sessions, at the return of the writ of view the tenant may be essoined from Monday until Tuesday. And that day he must plead or vouch, &c. if he have imparled before. So that it is most for the advantage of the tenant to demand the view at the first, before he takes any rule to plead, for by that means he may perhaps gain two sessions, *i. e.* for the view *usque prim' prox'* and then a special imparlance *usque pro proximo* which is seldom denied. 5. Essoin after View.

5. Upon the voucher, the writ of *summons ad Warrantizandum* may be returnable on Wednesday or Thursday, and then if *nihil* be returned, an *alias* is returnable on Friday or Sunday, and then a *pluries* returnable *pro. prox. &c.* But commonly the summons *ad warrantizandum* is returnable *pro prox. &c.* as is said before. (161) 6. Voucher. Summons ad warr' how returnable, alias pluries sequatur, &c.

6. Appearance] per vouchee. Essoin per vouchee.

6. At the next sessions when the *sequatur sub suo periculo* is returned, the vouchee must appear or essoin until Tuesday. If he appear, he must enter into the warranty or demand what the tenant or he that vouched hath to bind him to warrant the land (as the case may be) and then if he enter into the *warranty* the demandant counts *de novo* against the voucher, and then the vouchee imparles until Wednesday, or other day in the sessions, or he may have day till *pro die prox. sessionis* &c. and then must plead or vouch over, if he plead to issue, and issue be joined, then a *venire* &c.

Count de novo

8. Foreign Voucher.

So that the demandant is delayed 12 months certainly before an issue; but if the tenant have cause to vouch a foreigner who has no land in the county, which is called a foreign voucher, then day is given to *usque pro prox'* &c. *Et interim quod petens sequatur alibi si*, &c. And that delays the demandant another——————6 months.

9. Proceedings in a foreign voucher in Chester.

7. In the mean time a writ to remove the record before the justices of the *common pleas* at *Westminster* is procured from the *chancery*, in order to summon the vouchee, and that delays the demandant till the return at *Westminster*, which may be is the next term, and then if the tenant make default, a *procedendo* is awarded from *Westminster* to the judges at *Chester* to give judgment upon the default, and that cannot be till the next sessions, which gains six months more.——————6 months.

So that it is two years before judgment can be given upon a default of the tenant upon a foreign voucher. But if the tenant appear at *Westminster*, then a summons *ad warrantizandum* issues to warn the vouchee at *Westminster*, which delays the demandant nine returns, as it is said before, and the *alias* and *pluries* 15 weeks apiece more, which is

a year or thereabouts, and some times more.——— 12 months.

8. Upon the return of the summons or *pluries summons ad warrantizandum* the vouchee may essoin at *Westminster*, and that gains 15 days.——— 15 days.

10. Vouchee may essoin at Westminster upon a record removed from Chester.

9. At the day given by the essoin, the vouchee must appear and enter into the warranty and then a *procedendo* is sent down together with the record to the justice of *Chester*, and then at *Chester* the demandant counts *de novo* against the vouchee, and upon that the vouchee may imparle from Monday till Tuesday, and then must plead or vouch over, &c.

So that upon one single voucher the demandant is necessarily delayed from the time of the return of the original at least two years and an half (if all proceedings go regularly on) before he can get an issue; but if there be any mis-awarding of process or other irregularities, he may be delayed much longer, and sometimes forced to begin again. And if the tenant have a deed of vouchers, or there be more tenants than one, it is not likely to be ended before either demandant or tenant die, and then all must begin again. *Vid. Co. Entr.* 342, 343, 344.

Vid. the manner of proceeding upon a deed of vouchers before.

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CHAPTER XXII.

Of Pleas in Formedons.

PLEAS in abatement are common, and the same with other real actions, as false *latin*, variance, non-summons, &c.

Pleas in formedons. Abatements.

Barr.

1. It may be pleaded in barr, That the alienation by the tenant or the demandant was before the statute *De Donis Conditionalibus*, *Rast. Entr.* 360. *b.* But this is a plea never probable to be put in practice now since the statute of fines and limitations of actions.

A feoffment and lineal Warranty.

2. In barr may be pleaded a feoffment and lineal warranty with assets by descent, *Rast. Entr.* 361. *a.* 362. *a.* 14 *H* 6. 3. *Fitz. Abr.* 5. *Tit. Form. Br. Tit. Form* 73.

Collateral Warranty.

3. So likewise may be pleaded a collateral warranty in a fine or feoffment to a *formedon* in remainder, *Sym's case*, *Co. lib.* 8. 51. So in reverter, *Rast Entr.* 361. *b. Br. Tit. Form.* 73.

A fine with Proclamations

4. A fine with proclamations may be pleaded to a *formedon in descender*, and five years past, by the statute of *H* 7. This is a barr by virtue of the nonclaim within five years; but by the statute of 32 *H.* 8. *c.* 36. the fine itself being proclaimed, is a barr to the estate-tail, and so may be pleaded. *Co. Entr.* 317. *a. b.* and 324, 325. *a.* 326. *a. b.* 328. *b.*

Replication. Partes finis nihil habuer.

5. If a fine be pleaded in barr, the demandant may reply, *quod partes finis nihil habuer'*, &c. *Co. Entr.* 318. *a.*

Non dedit.

6. *Non dedit*, *i. e.* no such intail is a good plea in barr of all *formedons;* and it may be pleaded by the vouchee, *Co. Entr.* 322. *b* 329. *b.* 341. *a.*

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Abatement by the donor

7. An abatement into the land by the donor and avoiding it by a remitter of the rightful issue in tail after is a good plea in barr of any *Formedon*, *Co. Entr.* 325. *b. Crowther vs. Crowther.*

8. To a *formedon in remainder* may be pleaded in barr an estate-tail made by another long before the donor in the count had any thing, and that the tenants are heirs to the first in tail, *Co. Entr.* 334. *a. b.* 335. *a.* and note, that there in this plea is pleaded a fine at common law by the first donor, which only makes a discontinuance, and shews how the tenants are seised as in their *remitter* to the estate-tail. *Co. Entr.* 335. *a. b.* Remitter.

9. To this last mentioned plea the demandant may reply and maintain his count, and traverse the gift in tail, *Co. Entr.* 336. *a. b.* and the tenant in his rejoinder may take issue and maintain his barr, *i. e.* that there was such a gift, *Co. Entr.* 337. *b.*

10. A common recovery may be pleaded in barr to a *formedon in remainder* or *reverter*, either with double or single voucher; with single if the tenant to the writ were seised of the estate-tail at the time of the recovery, with double voucher, though he were not seised. *Co.* 1. *lib.* 63. *Capell's case. Vid.* the pleading of a recovery with a double voucher, the tenant to the *præcipe* being made by fine. *Co. ibidem* 56, 57 *Vid. Co. lib.* 3. *f.* 5. *a b. Owen* and *Morgan's case* cited in the marquis of *Winchester's case.* The case itself in *Moor, Rep.* 210. *Co. lib.* 3. 59. *a. Lincoln Colledge case.* Common Recovery.

11. It is a good plea to say, that after the gift the same donor was seised, and gave the lands to the same donees in fee, but not good, except he says that he was seised after the gift. *T.* 2 *H.* 6. 15. *tit. formedon* 1. *Fitz. Abr.* Donor seised after the gift.

12. A *remitter* may be pleaded in barr, as thus— that the donee was seised in fee, and being an infant made a feoffment to the donor, who gave the land to the infant in tail, by which he was remit- Remitter.

ted, whose estate the tenant hath. *M.* 3 *H.* 6. 19. *H.* 11. *H.* 6. 20. *tit. formedon. Fitz. Abr.* 2. and
(165) 11 *H.* 4. 5. *Br. form.* 24. & 5 *E.* 4. 9.

Exchange. 13. In a *formedon* the tenant may plead in bar an exchange between the ancestor of the demandant, and he under whom the tenant claims, and that the demandant entered into the lands given in exchange, and takes the profits. An alienee may plead this plea, though he be a stranger, for he is privy in estate, 3 *E.* 3. *tit. form.* 44.

Recovery in an assise, gift, mesne &c. 14. A recovery in an assise, and the gift mesne between the disseisin and the recovery, 27 *H.* 6. 8. *Br. tit. form.* 3.

Warranty. 15. By way of rebutter every stranger may plead a warranty, if he has the deed by way of a *qu' estate*, 42 *E.* 3. 19. *Br. tit form.* 10.

How the writ shall be general, count special. Vide Co. 2. p. 47 The feoffer after the stat. of uses, shall be supposed donor in a formedon, as it is in Winch. Entries 517. 16. *Vid. Br. tit form.* 46. 7 *E.* 6. how the writ shall be general and the count special in a *formedon* upon a use created by the statute of 27 *H.* 8. and *vid.* where the writ and count shall be general, and *sur ne dona pas* pleaded, the replication shall be special, and conclude *issint dona. Br.* 49. 2 *E.* 6. 1. *Mar.* and so the writ and count may be general, and the replication special, where a *formedon* is brought of land recovered in value. *Br. tit. form.* 75. see *Winch's Entris* 517. the record in *formedon* in remainder where the writ is general and the count special after the statute of uses grounded upon this case of *Br. tit. formedon* 46.

(166) CHAPTER XXIII.

Dower unde nihil habet.

What. 1. THIS is a writ of right in its nature called *breve de dote unde nihil habet.* and lieth where a woman taketh husband, who is sole seised at any

time during the coverture of lands in fee-simple or fee-tail of such estate, as the issue begotten between them may inherit the same. *F. N. B.* 361*.

Part of dower.

2. And the widow may have this writ though she have part of her dower in another vill and of another person, unless she have received part of the tenant himself in the same town, and then she must have a writ of right of dower. *Westminster* 2, *c.* 48. 3 *E.* 1.

The original writ follows.—

Original.

" The king to the sheriff, &c. command A that justly, &c. he render to B who was the wife of C, her reasonable dower which falls to her share, of the freehold which was the aforesaid C's, some time her husband in N whereof she nothing hath, as she saith, and whereof she complains that the aforesaid A unjustly deforceth her, and unless, &c." *F. N. B.* 148. *a.*

For a man and his wife it is—" That he render to B and C his wife, the reasonable dower of the said C, &c. whereof she nothing hath as they say, and whereof they complain that the said A deforceth them and unless, &c."

Process.

The process is *summons*, *grand cape* and *petit cape*.

The plaint in lieu of a count is thus,—*viz.* " A who was the wife of C by I S her attorney demands against N, the third part of one messuage, &c. with the appurtenances in W. as the dower of the said A of the endowment of the said C, some time her husband, &c." *Rast. Entr.* 234. *b*

* Dower lies not of a tenement, Str. 625. Raym. 1384.

Essoin. *Essoin de servitio regis* lies not in this writ by the statute of 12 *E.* 2. but the common essoin lies, and but one after issue joined by stat. *Marl. c.* 13.

Voucher. Voucher likewise lies as in other real actions.

View. View lies in a writ of dower *unde nihil habet*, as by *Rast Entr.* appears, though some have questioned it; but in a writ of dower where the husband died seised, the heir, nor any claiming under him shall have view by the common law, nor the alienee of the husband, now by the statute of *Westminster* 2. *c.* 48. *Co.* 2. *Inst.* 481.

Age. 4. The tenant shall not have his age in this writ, *i. e.* the parol shall not demurr for the nonage of the tenant in favour of dower. 5 *H.* 5. 13. 12 *E.* 4. 12.

Days in bank. 5. At *Westminster* a writ of dower, *unde nihil habet*, the return of the process is abridged by the statute of *Marl. c.* 12. 52 *H.* 3. In dower four days shall be given in the year, and more if conveniently may be, *Quære* how that is to be understood, for the lord *Co* 2. *Inst.* 124. does not expound it. And by *Rast.* and *Co. Entr.* the days are given according to the statute of 51 *H.* 3. as in actions long after the statute of *Marl.* and the statute of 32 *H.* 8. *c.* 21.

15 Days in judicial proces per Stat 16, 17 Car c. 6. 6. But after issue joined, by the statute of 16, 17 *Car. c.* 6. in dower 15 days only are to be given between the test and the return of every judicial process. In *Chester* it is *de die in diem.*

Death of the husband, trial by proofs. 7. If the tenant plead the husband to be alive, that shall be tried by witnesses, and in no other case in the law. 8 *H.* 6. 23. *Rast. Entr.* 228.

Finches law. 423. *Co.* 2. *Inst.* 80. 9 *E.* 2. lately printed by Serjeant *Maynard**.

Ne unque' accouple in loyal matrimony.

8. There is another plea in this action which draws the trial out of the ordinary course of a jury, and shall be tried by the bishop, and that is when the tenant pleads *ne unques accouple* in loyal matrimony, and if it be an inferior jurisdiction that cannot write to the bishop, as if the action be brought in the *Hustings* in *London*, or in any other corporation, the record is to be removed, to have it tried in the superior court, who may write to the bishop, and upon return of the bishop's certificate the record is to be remanded as in a foreign voucher. *Rast. Entr.* 228 *b. Co. Entr.*

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Record Cestr' Bre' episcope. 12 H. 4.

There is a record among the rolls of Chester in the castle of Chester, 12 *H.* 4 of Tuesday next after the feast of the Epiphany of our lord, in a writ of dower by Johanna the wife of Thomas Hollinworth against Hugh de Hollinworth of lands in *Hollinworth*. *Ne unques accouple*, &c. pleaded, and a writ is awarded to the bishop of *Coventry* and *Litchfield*, who returned the writ that the demandant was lawfully married, and judgment given for the demandant This is an evidence that the court of *common pleas* before the justice of *Chester*, ever was reputed a superior court, co-ordinate in its jurisdiction with the courts at *Westminster*.

Record removed from the city of Chester to the county court of Chester upon a plea of ne unques accouple, &c.

So in the city of *Chester* a record was removed (out of the *Portmoote* court) before the justices of *Chester* in order to have a writ to the bishop, and at the day in court before the justices the tenant made default, and the record was remanded, 22

* Vide ad hoc. 2 Raym. 374.

or 23 *Car.* 2. *Intet Berand Pelen' et Harrison Tenen in dote, &c.*

Damages recovered 3tat. Mert. 20 H. 3 c. 1.

9. By the statute of *Merton* 20 *H.* 3. *c* 1. the widow shall recover damages, *i. e.* the yearly value of the third part from the time of the death of her husband; but this must be in case the husband die seised, of which the jury must inquire, for if the husband died not seised, the wife can recover neither damages nor costs. *Co.* 1. *Inst.* 32. *b**.

When a writ of inquiry shall issue.

If judgment be given upon a confession, *nihil dicit*, or any other way than upon a verdict, if the wife suggest that her husband died seised, a writ of inquiry of damages issues, by which writ the sheriff is commanded to inquire whether the husband died seised, and if he did, what value the lands are by the year, and how long it is since the husband died, in which writ there may be likewise contained an *Habere fac' seisinam* of the third part recovered; and upon return of the inquisition judgment is entered for the damages, *Vid.* the writ and judgment. *Rast. Entr.* 238. *a.* 4†.

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Habere fac' seisinam, how to be executed.

10. The sheriff upon the execution of the writ of *Haber' fac' seisinam* is to give seisin of her third part by metes and bounds (if it can be done) to hold in severalty, particularizing the lands and parts of the house, &c. And this he may do without a jury, wherein it differs from an *elegit* and a *partitione facienda*. *Vid. Rast. Entr.* 238. *b.*

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* 1 R. L. 51. Vide etiam de hoc Harg. Co. Lit. 32 b. n. 198.

† Tenant in dower dies before writ of inquiry executed administrator cannot bring fei. fa. for the damages and mesne profits. 2 Salk. 252.

CHAPTER XXVI.

Pleas in dote unde nihil habet.

IN abatement of the writ, the tenant may plead that the demandant has so much land for her dower, in the same town assigned, and accepted before she brought her writ. 3 *E.* 3 *Itiner. Norf. Dower.* 76. Pleas in Dower. Abatement. 1. Land in the same town &c.

So entry into part, since the last continuance is a good plea in abatement. *Rast. Ent.* 234. *Dyer* 6. *E.* 6. 76. *b.* 2. Entry into part.

Sole-tenancy, joint-tenancy, and several tenancy are pleadable in this as in other real actions. *Rast. Entr.* 230. 3. Sole tenancy, &c.

1, Pleas in barr—The general plea is, *Ne unques seise que dower, &c. Rast. Entr.* 230. *a.* 10. Barr. Ne unques seise.

2. That the demandant was not nine years old at the time of the death of her husband, is a good plea in barr. *H.* 15 *E.* 3. *Dower* 67. *Rast. Ent.* 228 *a.* 2. 2. Not nine years old.

3. That the husband is not dead, a good plea, Vid, how this shall be tried. *antea fol.* 3. Husband not dead.

4. *Ne unques accouple, &c. vid. antea.* 4. Ne unques accouple.

5. Detaining of evidences of the land by the wife is a good plea in barr. And if in her replication she says, she was always ready to deliver them, and do tender them in court, she shall forthwith have judgment for her dower. *Rast. Ent.* 229. *b.* 7, 8 & 230. *a. Dyer.* 230. *a.** 6. Detainer of Charters.

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* Detainer of charters no plea after imparlance, becauſe he that pleads this plea muſt plead that from the death of his anceſtor, paratus fuit et ad hoc paratus exiſtit, to aſſign her dower if ſhe would deliver the charter. 1 Salk. 258.

6. Demandant seised by disseisin.

6. It is a good plea, that the demandant entered and disseised the tenant before her writ brought, and still is seised by disseisin. *Rast. Entr.* 231. *a.*

Judgment against the heir vouchee is not against the tenant.

7. Note when the heir is vouched in dower, if he have assets, judgment shall be always against the heir, and not against the tenant, and the tenant shall recover in value against the heir. And this is different from all other cases of voucher. *H.* 4. *H.* 7. *Dower* 20. 16 *E.* 3. *Dower* 56. 41 *E.* 3. 24. *Br. Dower* 10. This is confirmed by a record in the castle of Chester *Avint Sess. Ro* 10 *Oct.* 11 *Eliz.* in dower, where judgment is entered exactly according to this rule.

8. Issue not inheritable

A woman shall never be indowed of that land which her issue by her husband could never inherit, *Lit. Sect.* *Dower.* And therefore a remitter may be pleaded in barr, as to say, That the husband and a former wife were seised in special tail, and discontinued, and took back an estate in fee or tail general, and that the tenant is heir to the first in tail and so remitted. 44. *E.* 3. 26 *Br Dower* 14. Note this remitter cannot be given in evidence upon the plea of *Ne unques seise qu. dower. &c. Dyer* 30 *H.* 8. *f.* 41. *a.*

9. Atainder of treason

9. Attainder of treason or felony in most cases may be pleaded in barr. *Vid. le. stat. Br. dower* 82. 13. *E.* 3.*

10. Joint tenancy with the tenant.

10. Joint tenancy with the tenant, i. e. That the baron had nothing but as joint tenant with the tenant in fee, is a good plea in barr, not to be given in evidence upon *Ne unques seise, &c* 10 *H.* 6. 17. *Br. dower.* 84. *H.* 14. *H.* 4, *f.* 13 *p.* 3.

* Attainder of the husband for treason is no barr to dower. 1 R. L. 54.

And now I have done with writs of right, and with writs of right in their nature, and with them shall conclude this second book. And proceed in the next place to writs of entry. 2dly. To writs possessory ancestrel, as the writs of *Ayel, Besayel. Cozinage*. 3dly. To those writs which contain no certainty of messuages or acres in the writs, as *Nuper obiit, mortdancester and assise of novel disseisin*, and with this I shall make up and close the third book.

BOOK III. (172)

CHAPTER I.

Of Writs of entry in general.

1. THESE writs are brought commonly where the tenant or he that has the freehold in the land came to the possession, or did enter lawfully, *i. e.* without fraud or tort. As by the deed or consent of another, who either came to the land unlawfully (as by disseisin) or who had but a particular or defeasible estate. And they are called writs of entry, not only because they speak of the entry of the tenant in the writ, but likewise shew for what reason the possession ought not to be detained from the demandant. When to be brought. Why so called.

2. This description will comprehend the nature of most writs of entry. But there is another writ of entry upon a disseisin, which is called a writ of entry in *le quibus* or a writ of entry in nature of an assise against the tenant who made the disseisin to the demandant himself, which differs not from an assise of *novel disseisin* in the cause of action, but Entry in nature of an assise, what.

in the proceedings and process. *quær.* the reason of these two remedies for the same cause. *Vid. Reg.* 228, 229. *Finches law.* 261.

3 Degrees in Writs of Entry

3. In this plea or writ there are three degrees, 1. Against him who had the land by demise, &c. from the demandant himself. 2. In the *per*. 3. In the *per* and *cui*. The first is where the demandant counts of his own seisin, as for example, in the writ of entry *ad termin' qui non præteriit.* in the first degree it is thus.—

First degree.

"Command A that justly, &c. he render unto B one messuage, &c. in S which the said B demised to him for a term which is past as he says, and unless he doth it, &c." *Reg.* 227. *b.*

(173)

In the *per* or second degree when the lands were let by another, and not the demandant himself, as thus,—

2. degree.

"Command A that, &c. he render to B one messuage with the appurtenances in N which he claims to be his right and inheritance, and into which the same A hath not entry but by D the father (or mother or other ancestor) of the aforesaid B whose heir he is, who demised it to him for a term which is past, as he says, and unless he will do it, &c." *F.N. B.* 201. *b. Reg.*228. *a.*

In the *per* and *cui* or third degree, where one demands land of that tenant who had entry by one to whom some ancestor of the demandant or the demandant himself did demise it for a term now expired. As thus,—

3. degree.

"Which he claims, &c. and into which, &c. but by C to whom B the demandant or D the father (or other

ancestor) of the aforesaid B whose heir he is, demised it for a term which is past, &c." *F. N. B.* 201. *b.*

4. When the conveyances of the land or descents from one to another, went beyond the degrees at common law, the demandant was put to his writ of right, *i. e.* that if there were above two descents and two alienations before any action brought, and this was for the repose and quieting of mens possessions. *Co.* 2. *Inst.* 153. Writ of Right when beyond the Degrees.

5. But now the statute of *Marl. c* 30. has given remedy out or beyond these degrees, which is called a writ of entry in the post; and this in case of alienations and descents, where the entry of the tenant was at first lawful by descent or lawful conveyance, for in case of disseisin or intrusion, there was a writ of entry in the post at common law. *Fleta. Lib.* 5. *c.* 34. *Co. ibidem. F. N. B* 474*. Stat. Marl. c. 30. Writ of Entry in the Poſt.

6. What is said of the degrees in the writ of entry *ad terminum qui præteriit* is applicable to other writs of entry, as writs of entry upon a disseisin, &c. *F. N. B.* 474. Entry ad terminum qui præteriit

7. A man shall not have a writ of entry in the post, when he may have it within the degrees in the *per*, or in the *per* or *cui*. *F. N. B.* 476. No Writ of entry in the Poſt, where in the Degrees.

8. He who cometh into any land by record, or by election, succession, or by disseisin, the writ shall be against such person always in the post. *ibidem.* (174) Entry in the Poſt, againſt what perſons.

Writs of entry are of divers sorts, as first, writs of entry in the nature of an assise. 2. Writs of intrusion. 3. *Cui. in vita.* 4. *Cui ante divortium*

* 1. R. L. 80.

5. *Sur cui in vita.* 6. *Dum non fuit compos mentis.* 7. *Writs of entry ad communem legem.* 8. *Dum fuit infra ætatem.* 9. *Ad terminum qui præteriit.* 10. *Causa matrimonu prælocuti.* 11. *In casu proviso.* 12. *In consimili casu.* And *Britton* in the 114*th.* chapter of his book, *fo.* 264. *B.* says, that they are without certainty; but I shall treat only of these that are particularly mentioned.

All those writs may be brought in the *per*, or *per and cui*, or *post*, as the cause requires, as appears by *F. N. B.* where he describes the nature of those writs and how they are to be brought.

CHAPTER II.

Of a writ of entry in nature of an assise.

What. 1. THE writ of entry *sur disseisin* in nature of an assise, is properly grounded upon a *disseisin* done to the demandant himself, and then it may be brought in place of an assise, and it is called a writ of entry in *de quibus**.

Entry in the Quibus wherein the Per, Cui or Post. &c. 2. But a writ of entry in *de quibus* grounded upon a disseisin may be brought against him who did the disseisin to some ancestor of the demandant, or against him who comes under him that did the disseisin either to the ancestor or the party himself. And then it is a writ of entry *sur disseisin in le per:* Or against him who claims under him who claimed
(175) under the disseisor; and then it is called a writ of entry in the *per* and *cui*: but if he against whom the writ is brought claim at a farther distance from the first disseisor, then it is called a writ of entry in the *post.* And they who claimed in the *per* or *per* and *cui* were said to be in the degrees; and he that came to the estate or land in the *post* was

* A writ of Quibus lies instead of an assise. by tenant in fee, or his heir, if he or his ancestor be disseised of lands or tenements, rent or office, &c. F. N. B. 191. c.

said to claim out of the degrees. *Vide supra f.* and *F. N. B. ibidem*, and *Co. Lit.* 238. *b.* and 239. *a.* where those writs are treated of at large, and where it is shewn what makes a degree.

3. The writ of entry in nature of an assise is thus:

" Command A that justly and without delay, he render to B one messuage, &c. with the appurtenances in L, whereof the said A unjustly and without judgment hath disseised the said B within thirty years, now last past, as he says, and unless he doth it, &c." Original.

Note, the time for limitation of seisin in this writ before the statute of 32 *H* 8. *c* 2. was from the first voyage of *H.* 3, into Gascoine, *Reg.* 229.

Where it is brought of the ancestors seisin it is thus.

" That justly, &c. he render to B one messuage in L which he claims to be, &c. whereof the said A unjustly and without judgment hath disseised C (the father, or mother or other ancestor) of the said B whose heir he is within fifty years now last past, as he says, &c, and unless, &c." Original.

The limitation antiently was as is said before, but now altered by the statute of *H* 8 to fifty years*.

When it is brought in the per, it is thus.

" Which he claims. &c. and into which the same A hath not entry, except through C who demised it Original in the Per.

* No perfon fhall hereafter make any entry into any manors, lands, tenements or hereditaments, but within twenty years next after his right or title defcended. 1. R. L. 563.

to him, who thereof unjustly and without judgment hath disseised L the father, &c. of the said B within 50 years, &c."

When it is brought in the *per* and *cui* it is thus,

Original in the Per and Cui.

" Wherein the said A hath not entry, unless through C, to whom D demised the same, who thereof unjustly, &c. L the father, &c."

(176)

When the alienations or descents go further, i. e. out of the degrees, then the writ of entry in the post is thus.

Original in the Poſt.

" Which he claims, &c. in which, &c. unless after the disseisin which L thereof unjustly and without judgment, did to S the father, (or other ancestor) of the said B, whose heir he is, within fifty years &c " But if it be done to the demandant himself, then it is thus :—" unless after the disseisin which L thereof unjustly, &c. did to the same B within 30 years, &c."

Common Recovery upon Originals in the Poſt.

And upon this last writ of entry in the *post*, of the demandant's own seisin, are all or most common recoveries suffered at this day. And I conceive this real writ is rather chosen for such recoveries, because of the vouchees, in regard the tenant may vouch at large, and is not bound to vouch within the degrees as in other writs of entry, in the *per* and *cui*, and so it is most safe for purchasers who need not fear writs of error of wrong or illegal vouchers. Vid. for voucher within the lien, and voucher out of the lien. *W.* 1. *c.* 40. *Co.* 2. *Inst.* 243, 153, 154.

Proceſs.

4 The process in all these writs is *summons*, *grand cape*, before appearance, *petit cape* after appearance, in case of default.

5. *View, voucher, receit,* lies in all these actions. View, Voucher &c.

Quere of view in a writ of entry in the *quibus antea c. view.*

Voucher lies not by the disseisor himself. *Co.* 2 *Inst.* 352.

6. The count in a writ of entry *sur disseisin* in nature of an assise of his own seisin is thus.

"I S knight, by L B his attorney, demands against M one messuage, &c in N whereof the said M unjustly and without judgment disseised the said I S within 30 years last past, &c. And whereupon he says that he himself was seised of the said messuage with the appurtenances in his demesne, as of fee and right in time of peace, in the time of our lord the now king, by taking thereof the explees to the value, &c. And of which, &c. and thereof he brings suit, &c." *See Stowel's case, Pl. Com.* 353. Count. (177)

Note, it is not said which he claims as his right and inheritance, in this action in the writ or count, because it is brought of his own seisin and against the immediate disseisor. *Vid. Reg.* 229. *Rast. Entr.* 276. *b.* But see *F N. B* 474. That it ought to be which he claims in this writ as well as in those of his ancestors seisin. Note.

The count in the writ of entry in the *per* is as the other, save instead of "whereof &c." it is said, "and into which &c." *Vet. Lib. Entr.* 7. *b.* The same may be said of the writ of entry *Sur disseisin* in the *Per et Cui.* Count in the Per.

When it is of the seisin of the ancestor, the count must set forth the title, and is thus.—— Where the Count may set forth the Title.

Count.

" Whereof he says that I S, the father of the said B, whose heir he is, was seised of the messuage aforesaid with the appurtenances in his demesne as of fee in time of peace, in the time &c. by taking thereof the explees to the value &c. and from the said I S, descended the right &c. to the said B who now demands as son and heir &c. and whereof the said A unjustly and without judgment disseised the same I S, within 50 years now last past, and thereof he brings suit &c." *Rast. Entr.* 280. 279. *b.*

By whom to be brought.

7. *Note*, this writ of entry in nature of an assise, may be brought by a tenant in tail or tenant for life. And the count by tenant for life shall say, "that he was seised of the messuage aforesaid, &c in his demesne as of frank tenement," and so may a tenant in tail without setting forth how the estate-tail begun, or he may shew the gift in tail specially in his count as it is done in *Rast Entr* 277, 278. *Vid. F. N. B.* 475. *Dyer* 101. *Co. Entr.* 219. *b.*

Count in the Poſt.

The demand and count in a writ of entry *Sur disseisin* in the *Post*, brought by the disseisee himself is in every common recovery. And is thus — I S by T his attorney demands against A one messuage &c as his right and inheritance. And into which the same A hath not entry unless after the disseisin which H thereof unjustly and without judgment did to the said S within 30 years last past &c. And whereupon he says that he himself was seised of the said messuage with the appurtenances in his demesne as of fee and right in time of peace in the time of the lord the king, by taking thereof the explees to the value, &c. And in which &c. and thereof he brings suit &c. *Co. Entr.* 219. *a.*

(178)

Title, where to be alledged.

Thus a writ of entry *Sur disseisin* in the *post* brought by the heir of the disseisee, and then there must be a title alledged as before. *Rast. Entr.* 280.

8. After the count, the tenant may imparle. Voucher, prayer in aid, receit, lies in all these writs, for which see before. *Rast. Entr.* 271. 285, 286. Imparlance, Aid, receit, &c.

9. The judgment against the tenant is.—"Therefore it is considered that the said I S recover against the said A his seisin of the messuage aforesaid with the appurtenances and the same A in mercy &c." Judgment.

If there be a voucher or more, as in all common recoveries there are, then it is.——Recover against the said A his seisin of the messuage aforesaid with the appurtenances. And that the same A have of the lands of said L (the vouchee) to the value &c. And the said L in mercy &c. And if there be more vouchers than one then it is—— And that the said L have of the land of the said C (the second vouchee) to the value &c. And so further according to the number of the vouchers. *Co. Entr.* 219. *b. Rast. Entr.* 284. Judgment against vouchee.

This writ was chiefly used where the entry was taken away, after a disseisin by the disseisors dying seised, and a descent, otherwise an assise against the disseisor himself was the ordinary remedy.

CHAPTER III.

Pleadings in a writ of Entry, in nature of an assise. (179)

1. NON-TENURE in abatement of the writ is a good plea, as in all real actions. *Rast. Entr.* 277. *b. briefe.* 1. *c.* 2. Abatement. Non-tenure.

2. Join-tenancy with another who is alive, a good plea, in abatement, to which the demandant may reply that the feoffment was by covin, and that the tenant takes the profits. *Rast. Entr.* 276. *a.* 272. *b.* Join-tenancy.

Sole-tenancy. 3. Sole-tenancy may be pleaded in abatement, and over in barr *non disseisivit Rast. Entr. ibidem.*

No entry by him in the writ. 4. When the tenant did not enter by him alledged in the writ, it is a good plea. 44 *E.* 3. 39. *Rast. Entr.* 249. *a. Keilw. Rep.* 93. *a.*

Pleas in Barr.

Barr, Hors de son fee. 1. In a writ of entry in nature of an assise of a rent, *Hors de son fee* is a good plea. *Rast. Entr.* 272. *b.* 5.

Non disseisivit. 2. *Non disseisivit* is the general issue. *Rast. Entr.* 272 *b.*

Descent with colour. 3. A man may plead a descent in barr giving colour to the demandant, otherwise it amounts but to the general issue. *Rast. Entr.* 273. *a.* 8.

Replication. Descent avoided. 4. The descent before, confessed and avoided by virtue of a recovery in a writ of right against a tenant for life, the remainder in fee being in the father of him who pleaded the descent, who entered by virtue of his remainder, and died seised, and the recoverer entered upon him. *Rast. Entr.* 273. *a. b.*

(180)

Rejoineder. Recovery falsified. 5. The tenant may falsify the recovery by pleading that the tenant in the recovery had not the particular estate granted to him, so as to make him tenant to the *precipe. Rast. ibidem.*

Entry by escheat. 6. Entry by *escheat* for want of an heir, is a good plea in barr. *Rast. Entr.* 273. *b.* But must give colour, otherwise it amounts but to the general issue Replication, *Quod habuit exitum*, the rejoinder, *Quod est Bastardus. Rast. ibidem.*

7. A recovery in a writ of entry *en le post*, against a stranger, and the title of the demandant *mesne* between the disseisin and the recovery. *Rast. Entr.* 274. *a.* Recovery.

8. Sale by executors by virtue of a will with colour to the demandant, may be pleaded in barr. *Rast. Entr.* 274. *a. b.* Sale by executors.

9. A feoffment may be pleaded in bar with a colour *Rast. Entr* 275. *a.* In the replication the feoffment may be avoided by a former feoffment by another. The defendant may rejoin that the feoffment was by disseisin and continual claim pleaded. The plaintiff in the rebutter may traverse the continual claim. *Rast.* 275. *a. b.* Feoffment.

10. An entry may be pleaded in barr, by reason of an alienation by fine made by a tenant for life, *Rast. Entr.* 280. In the replication may be pleaded, not comprised in the fine. *ibidem.* Entry for a forfeiture, Nient compris.

11. Bastardy in the demandant may be pleaded. *Rast. Entr.* 299. *b.* 2. Bastardy.

12. In entry in the *post* that he was seised till by the demandant disseised, and he re-entered, a good plea in barr. 16 *H.* 7. 4. *Br. Tit. Entr.* 49. Re-entry upon the demandant.

CHAPTER IV.

Of Writ of Intrusion. (181)

1. A WRIT of Entry grounded upon an Intrusion, lies where tenant for life, in dower or by the curtesie die seised, and after their deaths, one intrudes and enters into possession of the land, then he in reversion in fee or for life shall have a writ of entry upon this intrusion. *F. N. B.* 506, 509. What.

After death of tenant in dower.

The writ of entry after the death of tenant in dower is thus——

Original.

" The king to the sheriff, &c. Command A, that justly, &c. he render to B, one ploughland, with the appurtenances in N, which he claims to be his right and inheritance, and into which the same A hath not entry but by the intrusion which he made into it after the death of C, who was the wife of D, who held it in dower of the gift of the aforesaid D, sometime her husband, the father or brother of the aforesaid B, whose heir he is, as he saith, and unless, &c." *F. N. B.* 203.

Original in the per.

In the *per* thus,——" And into which the same A hath not entry but by C, who demised it to him who intruded into it after the death of D who was the wife of E, who held it in dower, of the gift of the aforesaid E, sometime her husband, &c." *Ib.*

Original in the per and cui,

In the *per* and *cui* thus,——" And into which the same A hath not entry but by C, to whom D demised it, who intruded himself into it after the death of, &c." *Ib.*

Original in the post.

In the *post* it is,——" Into which the same A hath not entry but by the intrusion which C made into it after the death of D, who was the wife of E who held it in dower of the gift of the aforesaid E, sometime her husband, brother of the aforesaid B, whose heir he is, and which after the death of the aforesaid D ought to revert to the aforesaid B, as he saith, and whereof he complains, &c. and unless, &c." *Ib. Vide Register*, 233, 234, for several writs brought after the death of tenant in dower.

The writs After the death of the tenant by the courtesy, and of tenant for life, in the *per*, *cui* and *post*, *Vide Register* 234. *a. b.* After death of tenant per courtesy.

Note, there is no precedent in the book of entries, Coke or Rastall, or *Vet. Lib. Entr.* for the count in intrusion after the death of tenant in dower, or by the courtesy. But in dower I conceive it may be thus upon the first writ mentioned before—— (182) No precedent for count in lib. entr.

"B by S his attorney, demands against A one messuage, &c. which he claims as his right and inheritance, and into which the same A hath not entry but by intrusion which he made after the death of L who was the wife of D, which she held in dower of the gift of the said D, late her husband (his father or &c. other ancestor) whose heir he is: and whereupon he saith that the said D was seised of the messuage aforesaid, with the appurtences in his demesne, as of fee in the time of peace, in the time of our lord the now king, &c. by taking thereof the explees, &c. to the value, &c. And so being seised he died at————&c. after whose death the said L, who was the wife of the said D held the same in dower of the gift of the said D her late husband, and was thereof seised in her demesne, as of frank tenement in time of peace, in the time of the now lord the king, by taking thereof the explees, &c. to the value, &c. and from the said D the reversion of the said messuage with the appurtenances, descended to the said B as son and heir, &c. And afterwards, to wit, on the day of in the year the same L at died seised of such estate, and into which, &c. and thereof he brings suit, &c." Count after death of tenant in dower.

If the wife come to her dower by recovery, or the reversion be purchased of the heir, the declaration Count variant.

varies according to the writs, as you may find in the register.

And after death of tenant by the courtesy, the count may be thus :——

Count after death of tenant per curtisie.

" B by I S his attorney demands against A, one messuage, &c. which he claims as his right and inheritance, and into which the same A hath not, &c. but by intrusion which he therein made, after the death of E who held the same by the courtesy of England, after the death of D his late wife (the mother, or other ancestor &c.) whose heir he is, and whereupon the said B says that the said E and D in the right of the said D were seised of the said messuage with the appurtenances in their demesne, as of fee in time of peace, in the time of our lord the now king, &c. by taking the explees, &c. to the value, &c. And being so seised, the same D at died, after whose death the said E held the same as tenant, by the courtesy of England, and was thereof seised in his demesne, as of frank tenement, by the
(183) courtesy of England, in time of peace, in time of our now lord the king, by taking thereof the explees to the value, &c. And from the said D the reversion of the said messuage with the appurtenances descended to the said B as son and heir of said D. And afterwards, to wit, on the day in the year the same E died at seised of such estate, and into which, &c. and thereof he brings suit, &c."

Per, cui, post. This may be in the *per, per and cui* and *post.* And by such as purchase the reversion, which is termed *(Ex assignatione)* and then the declaration varies according to the case. *Vid. Register* 234.

The count after the tenant for life is thus.

Count after death of tenant for life.

" B, by I S his attorney demands against A one

messuage, &c. which he claims to be his right and inheritance, and into which the same A hath not entry, but by the intrusion which he made into it after the death of C to whom the said B demised for the life of said C, &c. And whereupon the said B says that he was seised of the said messuage with the appurtenances in his demesne, as of fee in time of peace, in time of the now lord the king by taking thereof the explees, to the value, &c. And being so seised he demised the said messuage with the appurtenances to the said C, for the life of the said C, by virtue whereof the same C was thereof seised in his demesne as of frank tenement, in time of peace, in the time of the now lord the king, by taking thereof the explees to the value, &c. And the same C afterwards died seised. And into which, &c. And thereof he brings suit, &c."

For the counts in the *per*, *per* and *cui*, and in the *post*, and for the heir upon the demise of his ancestor, and *Ex assignatione* when the reversion is purchased. *Vid. Rast.* 415, 416.

The process in this writ before appearance, is *summons* and *grand cape*; and after appearance, *petit cape*. Process.

View, *aid*, *voucher*, *receit*, lies in these writs, *Quere*, *de view*, *vid. Rast. Ent.* 416. *a. b. F. N. B*, 509. View, Aid, Voucher, &c.

The judgment is, "that the demandant recover his seisin, &c." as in the other actions next before. Judgment.

CHAPTER V.

Pleas in this Action.

1. PLEAS in abatement, as to non-tenure, joint-tenancy, sole tenancy, &c. are the same as in other real actions. (184) Abatement. Non-tenure,

A plea in abatement peculiar in this action as to non-tenure.

But there is a particular plea in abatement peculiar to this action. As that such an one died seised, and the land descended to him, pending the writ with a traverse, that he was tenant at the time of the writ brought, whereas in other pleas of non-tenure he must say, that he was not tenant at the time of the writ brought, nor at any time after. *Hast Entr.* 416. *a.* 4. But the reason of this pleading in intrusion is because the writ must needs be false, if he were not tenant at the time of the writ, and that the land descended to him pending the writ, for then he could be no intruder before the writ brought.

Traverse upon a traverse.

And note that in the entries there is a traverse upon a traverse i. e. The demandant does not take issue upon the non tenure traversed in the tenant's plea, but upon the dying seised.—And in the rejoinder, the tenant joins issue upon the dying seised. *Rast. ibidem vide* 14 *H.* 4. 17.

Barr.

Bar. Q. to say tenant for life was seised in fee.

Quere. If the writ be brought for an intrusion after the death of a tenant for life, whether the tenant may plead that he who is named tenant for life was seised in fee, issue was taken upon it, but doubted 43. *E.* 3. 5. *Br. Intrusion* 2.

The ancestor never had any thing. Replication that he was seised.

2. It is a good plea in intrusion brought by the heir after the death of a tenant for life upon a lease made by his ancestor, that the ancestor never had any thing in the land. In this case the demandant must reply and shew that he was seised and demised and issue shall be upon the seisin. 43 *E.* 3. 19. *Br. Intrusion* 3.

(185)

Tenant named tenant for life had nothing from the demandant.

3. Intrusion upon the death of tenant for life upon a lease made by the demandant, that he, named tenant for life was tenant in tail of the gift of the tenant, and that he died without issue, and he en-

tered as in his reversion *absque, hoc*, that he named tenant for life had any thing in lease from the demandant at the time of his death, a good plea. 24 *E.* 3. 74. *Br. Intr.* 11.

Note, the heir may enter upon the intrudor or abator if he will, and so at this day he may bring his *ejectione firme* which is now the common action for recovery of land where the entry is lawful. 5 *H.* 7. 6. *Br. Entrie Congeable*, 119. Ejectment may be brought at this day.

CHAPTER VI.

Cui in Vita.

1. THE writ of *Cui in Vita* lies where the husband alieneth the right, inheritance or freehold of his wife by feoffment or grant for life, or in tail, then the wife after the death of her husband may have this writ; or the heir of an estate in fee-simple may have his writ called *Sur Cui in Vita*, if the wife die before she brings her *Cui in Vita*. *F. N. B.* 481. What.

2. This writ lieth where the wife hath an estate for life or in tail aliened by the husband, but in the case of an estate-tail the heir cannot have a *Sur Cui in Vita*, but must bring his *Formedon*, *F. N. B.* ibidem. Where lieth.

3. This writ is twofold, either at common law, or by the statute. At the common law, as in case of alienation by the husband. *F. N. B. ibidem. Co.* 2 *Inst.* 343. *Fleta. lib.* 5. *c.* 34. 36 By the statute, in case where the husband lost the wife's land by default or by render in a real action, in which case the wife was put to her writ of right at common law, but now by the statute of *W.* 2. *c.* 3. she may bring her *Cui in Vita*. *Co.* 2 *Inst.* 341. This is to be understood where the wife was seised in fee-simple, and the action is brought against the husband and wife. *Co.* 2 *Inst.* 342. 343. Quo. uplea.

Recovery by deft against baron of an eſtate for life.

But in case of a tenancy for life, if the husband lose by default in a *Præcipe quod reddat*, the wife shall have a *Cui in Vita*, for the recovery shall be intended as a demise by the husband, otherwise the wife should be without remedy. *Co.* 2 *Insi.* 343.

Quod ei deforceat upon Recovery by default vs. baron.

In case of an estate-tail, the wife shall have a *Quod ei deforceat* upon the husband's losing by default by the statute of *W.* 2. *c.* 4.

Original.

The writ is as followeth, *viz.*——" Command A that justly, &c. he render to B who was the wife of D one messuage with the appurtenances in N which she claims to be her right and inheritance, and into which the same A hath not entry but by the aforesaid D, some time the husband of her the said B, who demised it to him, whom she in her life-time could not contradict, as she saith." *F. N. B.* 193. *b.* *Reg.* 232. *b.*

Demiſe alledged, though a recovery by default.

This form will serve both in case of an alienation, and losing by default, and in case the demise be traversed the demandant may set forth the recovery, by default instead of a demise. *Reg.* 235. *a.*

Per, Cui, Poſt.

This writ may be brought in the *Per*, *Cui* and *Post*, *Reg.* 232. *a.*

The form where the wife was seised of an estate-tail, *vide Reg.* 232.

Count variant.

The count varies in this action according to the case. There is no count for the wife according to the first writ before mentioned, either in *Co.* or *Rast. Entries*. But I conceive it may be thus.——B, who was the wife of L, by I S, her attorney, demands against A one messuage, &c. which she claims, &c. and in which, &c. and whereupon the

Count.

same B says that she was seised of the messuage aforesaid with the appurtenances in her demesne, as of fee in time of peace, in the time of the now lord the king, by taking thereof the explees to the value, &c and into which, &c. and thereupon she brings suit, &c.

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Count where the wife is tenant in tail brought by baron and feme is thus.——A and C his wife by I S their attorney demand against T B one messuage &c. in S which she claims to her and the heirs of the body of the same C and R her late husband begotten upon a demise which L M thereof made to the same C and R into which the same T B hath not entry, but by the said R who demised the same to him, whom she in her life time could not contradict &c. And whereupon they say that the said L M was seised of the tenements aforesaid with the appurtenances in his demesne as of fee, and being so thereof seised, gave the messuage aforesaid with the appurtenances to the said C and R and the heirs of the bodies of the said C and R lawfully to be begotten by virtue of which gift the same C and R were seised thereof in their demesne as of fee and right according to the form &c. in time of peace in the time of the lord king Edward the late king of England by taking thereof the explees to the value &c. and afterwards the said R died and the said C survived him, and took to husband the said A and in whom &c. And thereupon they bring suit &c. *Rast. Entr.* 139. *a.*

Count per Bar. and Feme'.

Note, here by this count you may observe these things. 1. That a gift in tail may be alledged in the writ as a demise (*ex dimissione qu. L M inde fecit.*) 2. That in the count the beginning of the estate-tail must be set forth. So if the estate-tail, or an estate for life were limited by way of use, the deed of uses must be set forth in the count, as you may see in

Things to be observed in the count.

Co. Entr. Cui in Vita *Vide* the count for the heir in the *Per* and in the *Post. Rast. Entr.* 139. *a. b.*

Proceſs. The process is *Summons*, *Grand Cape* and *Petit Cape*.

View, voucher, &c. *View*, *Voucher*, *Receit*, *Aid*, *Summons* and *severance*, lies in this action; but note once for all, that *Summons* and *Severance* lies in all or most real actions. *Vide supra Rast. Entr.* 140 *a. b.*

Judgment. The judgment is as in other real *Præcipes*.

This action out of uſe per ſtat. 32 H. c. 28. But note that this writ or action of *Cui in Vita* or *Sur Cui in Vita*, is now of no use since the statute of 32 *H.* 8. *c.* 28. which says, that the alienation of the husband by fine, &c. of the land of the wife shall be no discontinuance to take away the entry of the wife or her heirs*.

(188) *Pleas in this Action.*

Bar. *Barr.*

Acceptance of rent by the wife. If a lease be made or a feoffment by baron and feme, reserving a rent, and the wife accept the rent after the death of the husband, this is a good plea in bar, otherwise if the wife do not join. 26 *H.* 6. 2. *Br. Cui in Vita* 2. Thus much shall suffice for pleas in this writ, being out of use.

CHAPTER VI.

Cui ante Divortium.

What. THIS writ is where the husband aliens the wife's lands whereof she was seised in fee-simple, tail, or for life, and after they are divorced, the wife may have this writ to recover the land, as she might have

* 1 R. L. 326.

the *Cui in Vita* after the husband's death. It is of the same nature, and the same process and proceedings as in the *Cui in Vita.*

This writ may be brought in the *Per, Cui* and *Post. F. N. B.* 510. Per, Cui, Post.

The heir may have *Sur Cui ante Divortium,* except his mother had an estate-tail, and then he is put to his *Formedon. F. N. B.* 510. Sur Cui in Vita by the heir: Formedon, where.

The writ in the *Per* is thus.——

The king, &c. command A that justly, &c. he render to B who was the wife of D one messuage with the appurtenances in N which she claims to be her right and inheritance, and into which, &c. but by the aforesaid D, sometime the husband of her the said B, who demised it to him, whom she could not oppose before the divorce between them solemnized. *Reg* 233. *Vide* there for the *Cui* and *Post. F. N. B.* 204. *a.* Original.

Vide le count and process *antea mutatis mutandis* in *cui in vita.* 209. 210. Count, process

Pleas in this action.

This writ and the next following, viz: *non compos mentis* are now of little use, and therefore the pleadings in them are of no great use neither.

In this writ the tenant may plead the divorce repealed. *Rast. Entr. Cui ante Divor.* Divorce.

In the *Dum non fuit compos mentis, Fuit compos mentis tempore feoffamenti, &c.* is the general issue. *Rast. Entr.* 249. *b.* A feoffment pleaded in the *Dum non fuit, &c.* made by him who was suppo- Pleas in dum non fuit compos, &c. fuit compos, &c.

sed *non compos*, &c. and others; as to the others *petit judicium*, &c. As to the part of him *non compos*. &c. *tenens dicit quod fuit compos*, &c. *Rast. Entr.* 249. *b.*

Heir may enter

Note, the heir after the death of *non compos*, &c. may enter if he please.

CHAPTER VIII.

Dum non fuit Compos mentis.

What.

1. IS a writ of entry for him who has aliened his land in fee-simple, tail, for life or years, whilst he was of unsound memory. *F. N. B.* 504. and may be brought against the immediate alienee, or in the *per*, *cui*, or *post*, *ibidem*.

The writ against the immediate alienee is thus,—

Original.

" The king, &c. command A that he render to B one messuage, &c. which the same B demised to him, while he was not of sound mind, as he saith, and unless he will do it, &c." *F. N. B.* 202. *a*. *Reg.* 228.

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Per, Cui, Poſt

See there in the *Per*, *Cui*, and *Post*, And for the heir in the *Per*, *Cui*, and *Post*.

Quere.

Quere how this agreed with the ancient maxim in law, that a man cannot stultify himself, as it is

Beverley's cafe

solemnly resolved in *Beverley's* case. *Co. lib* 4. 123. But for the heir it is agreed by all, that he may have this writ in case of any alienation of his ancestor by matter in pais, but not by matter of record.*

It seems strange that there is such a writ in the register, and yet *Beverley's* case be so resolved. And *Lit sect* 405 *acc.*

* See this doctrine elaborately diſcuſſed. 1 Pow. on Contracts 12 to 29.

For the count and pleadings. *Vide Rast. Entr.* 248, and before, 211. Count, Pleadings, &c.

But there is no count for the idiot himself.

CHAPTER IX.

Of Entry ad Communem Legem.

1 A WRIT of entry *ad Communem Legem* is for him in reversion after the death of tenant in dower, for life, or tenant by the courtesy, where any of them have aliened the land in fee, in tail, or for any other life. *F. N. B.* 518. What.

2. It is so called, because it was an ancient writ at common law in those cases, but in some other cases it is given by the statute of *W.* 2. *c.* 3. As where any of those tenants do lose by default, or render in a real action *Vide Co.* 2. *Inst.* 346 and *Reg.* 235. whereas before the statute of *W.* 2. these tenants were put to a writ of right. Why so call'd.

3. This writ is always after the deaths of the said particular tenants in case of alienation, for of an alienation of tenant in dower, in the lifetime of the tenant there is given a writ of entry in *casu proviso*, by the statute of *Glocester*, *c.* 7. 6 *E.* 1. Where it lies.

4. This writ is thus,—"The king, &c. command A, that justly, &c. he render to B, &c. which he claims to be the right and inheritance, and into which the same A hath not entry but by C who was the wife of D, who demised it to him, who held it in dower of the gift of the aforesaid D, some time her husband, the father or other ancestor of the aforesaid B, whose heir, &c. as he saith, &c. and unless, &c." *F. N. B.* 207. *c. sect.* 4. *Reg.* 234. Original.

This may be brought in the *per, cui or post.*

5. After the death of tenant by the courtesie, it is thus——

Original. "Command, &c. that, &c. he render to B, &c. which he claims, &c. into which the same A hath not entry but by C who held it by the law of England after the death of D, some time his wife, the mother of the aforesaid B whose heir he is, as he saith, &c." *F. N. B.* 208. *a.* 2. *Reg.* 235.

Who may have it. 6. He in reversion may have this writ or a *Mordancester*, by the statute of *Glocester*, *c.* 3. notwithstanding the tenant by the courtesie was last seised.

Per, cui, post, It lies in the *per*, *cui* and *post*.

After death of Tenant for life 7. After the death of tenant for life it is thus,—

Original. "Command A that, &c. he render, &c. which he claims, &c. and into which the same A hath not entry but by C to whom the aforesaid B or C father (or other ancestor) of the aforesaid B whose heir he is, demised it for the life of him the said C as he saith, &c." *F. N. B* 208. *a.* *Reg. ibidem.*

It lies in the *per*, *cui*, and *post*.

Count. 8. The count in this action is to be varied according to the case, and is as in other writs of entry as to the general form. I find no count in the books of entries in this action.

It is thus, as I suppose, in the first writ.

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Count. "And whereupon the same B says that D the father of the said B was seised of the messuage aforesaid, with the appurtenances in his demesne as of fee in time of peace in the time of the now lord the kin by taking thereof the explees to the value, &c. And

being so thereof seised, the same D at L took to wife the said C. And from the said D descended the right of the said B, who now demands as son and heir, &c. And into which, &c. And thereof he brings suit, &c.

9. The process is as in other writs of entry. Process.

Note, that this writ is intended as a remedy where the alienee died seised, and the land descended to his heir, for if a tenant for life had aliened, and the alienee were living, it was a forfeiture at common law, as it is at this day, and in such case he in reversion may enter. *Vide Co.* 2 *Inst* 309. Forfeiture.

Pleas in this Action.

Vide antea. The pleas in abatement are as in other real actions.

In bar. The tenant may plead *(Ne alienæ pas)* or any other thing that may bar the demandant's title. Bar.

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CHAPTER X.

Dum fuit infra ætatem.

1. THIS writ of entry is for him who during his nonage has made a feoffment, lease for life, or in tail, after he attains to full age, he may have this writ; so may the heir upon the alienation of his ancestor within age. *F. N. B.* 476. 477. What.

2. Or the infant may enter and avoid his own feoffment while he is under age, if he please. *Ibidem.* Infant may enter.

3. This writ is not now in use ordinarily, because the entry of the infant is not taken away, either while he is under age or after (as I conceive) and an *ejectione* Whether now in use.

firmæ is now the ordinary remedy. *Vide Reg.* 229. *a.*

But if the alienee had died seised, or had aliened to another, and the infant had not entered during his nonage, the infant at full age could not have entered but was put to this writ. Quer. at this day whether the entry in such case be not taken away, especially if he that is in by descent or conveyance has had quiet possession for five years according to the stat. of 32 *H.* 8. 33. *Co.* 2 *Inst.* 153.

4. The writ against him to whom the alienation is made, is thus, viz.

Original. "The king, &c. Command A that, &c. he render to B who is of full age as he saith, two messuages, &c. which the same B while he was under age demised to him, as he saith, and unless he will do it, &c." *F. N. B.* 192. *b. Reg.* 228. *b.*

In the per and cui.

Original in the per, cui, &c. "Into which the same A hath not entry but by C, to whom the aforesaid B demised them, &c." *ibidem.*

In the post thus.

Original in the post. "Into which, &c but after the demise which the aforesaid B while he was under age thereof made to W as it is said, and whereupon he complains, &c. and unless, &c." *Ibid.*

(Whereupon he complains) is never in a writ in the *per*, or *per* and *cui*, but in the *post*. *F. N. B.* 502.

5. The count is as follows.

Count. "A who is of full age, &c. demands against H one messuage, &c. with the appurtenances in N

into which the said H hath not entry, but after a demise which the said A, while he was under age made thereof to the said W. And whereupon he says that he was seised in his demesne as of fee and right in time, &c. And into which, &c. And thereof he brings suit, &c.

6. If the action be brought as heir, then the count is thus. Count as heir.

"Into which the same H hath not entry but by B the father of the said A, whose heir he is, who demised the same to the same H while the said B was under age: And whereupon he says that the said B, the father of the said A, whose heir he is, was thereof seised in his demesne, as of fee and right." *Reg.* 229. *Rast. Ent.* 248. *b.*

7. The process is *summons*, *grand cape*, *petit cape*, *view*, *voucher* and *receipt* lies in this writ. Process.

Pleas in this Action.

In abatement, as in all other real actions.

In bar. *Fuit plenæ ætatis tempore*, &c. *Rast. Ent.* 248. *b.* Bar.

CHAPTER XI.

Ad Terminum qui præteriit. (195)

1. THIS writ of entry lies where a man makes a lease for life or years, and the lessee after the term is ended, or a stranger enters into the land and detains the possession from the lessor or his heir. *F. N. B.* 501. What.

2. This writ may be brought in the *per*, *per* and *cui*, or in the *post*.

Whether in use.

3. But note, this writ is little in use, because the entry of the lessor or his heir is not taken away, for that he may bring an assise of *novel disseisin* by the statute of *W.* 2. *c* 25. which is now supplied by the *Ejectione firmæ*. *Reg.* 228. *F. N. B.* 502.

Where it lies not. W. 2. c. 25.

4. While the lessee who has aliened is living, or his alienee, this writ does not lie since the statute of *W.* 2. *c.* 25.* (but an assise of *novel disseisin* only) which has made both the feoffor and feoffee being both disseisors even at common law, *vide Co.* 2 *Inst* 413. *Sed Quær.* for the *Reg.* 228. and *Co.* 2 *Inst.* 413, seem to differ. In all cases of land, &c. where a man may have an assise, he may have an *ejectionè firmæ*. Note, if both feoffor and feoffee be dead, this writ lies. *Co. ibidem.*

5. The writ in the first degree is thus,——

Original 1. gr.

The king, &c. command A that justly, &c. he render unto B one messuage, &c. with the appurtenances in L, which the same B demised to him for a term which is past as he says, and unless he will do it, &c. *Reg.* 227. *b.*

6. In the second degree in the *per* and *cui*.——

Original 2. gr.

The king, &c. into which the same A hath not entry unless by C, to whom the said B demised the same for a term which, &c.

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7. In the post thus,——

Original 3. gr.

The king, &c. into which the same A hath not entry but after a demise which the same B thereof made to D for a term which, &c. and which after

* 1 R. L. 82.

that term ought to revert to the said B as he says, whereupon he complains that the said A deforces him, and unless he will do it, &c.

8. The count is as follows :—"And whereupon he says, that he was seised of the messuage aforesaid with the appurtenances in his demesne as of fee in time of peace, in the time of the lord the now king, by taking thereof the explees to the value, &c. and so being seised on the day, in the year of the reign of the lord the now king, at , demised the messuage aforesaid with the appurtenances to the said B for a term of years then next ensuing and fully to be compleated, and which, &c. and thereof he brings suit, &c." *Reg. Rast. Entr* 25. Count.

9. The process is in this as other writs of entry. Process.

Pleas in this action.

The demise is traversable, *viz. non dimisit ad Terminum*, &c. *Rast. Entr.* 25. Bar.

CHAPTER XII. (197)

Causa Matrimonii Prælocuti.

1. THIS writ lies where a woman gives land to a man in fee or for life, to marry her in convenient time, and he does not, she may have this writ. *F. N. B.* 511. Where it lies.

This writ is obsolete, and therefore I shall not inlarge upon it. *Vide* the writ in the register, in the *per, cui* and *post* 233. Not in use.

The count is not in *Rastall's* Entries, but is easy to be drawn as other counts in writs of entry, observing the writ. Count.

Proceſs. The process is *summons, grand cape, petit cape.*

CHAPTER XIII.

Entry in Casu proviso.

Where it lies ſtat. Gloceſtor. 6 E. 1, c. 7.

1. THIS writ is given by the statute of *Glocester*, *c.* 7. 6 *E.* 1. where a tenant in dower aliens in fee, for life or in tail, he in reversion may have this writ during the life of tenant in dower.

The common law before ſtat. Gloceſter.

2. Note, at common law he in reversion might have entered for the forfeiture, but if the feoffee had died seised before entry, then he in reversion could not have entered, nor could have any action till after the death of tenant in dower, so that the warranty of tenant in dower would be a perpetual bar to him in reversion if he was heir to her; to prevent which mischief this statute was made, for the writ of entry *ad communem legem* lay not during the life of tenant in dower. *Co.* 2. *Inst.* 309. *F. N. B.* 512.

(198)

Per, cui, Poſt. Original.

3. This writ lies in the *per*, *cui* and *post*. In the *per* thus:——"The king to the sheriff, &c. command A that, &c. he render to B, &c. which he claims, &c. and into which the said A, &c. but by C who was the wife of D who demised it to him, who held it in dower of the gift of the aforesaid D, some time her husband, the father (or other ancestor) of the aforesaid B, whose heir he is, and which after the demise made by her the said C to the aforesaid A against the form of the statute thereof provided at Gloucester, by the common council of our realm, ought to revert in fee to the aforesaid B by the form of the same statute, as he saith, and unless, &c." *F. N. B.* 205. *Reg.* 235.

In the *per*, *cui* and *post*, *vide Register*, *ibidem*, and *F. N. B.* 513.

The count is in this as other writs of entry, *mutatis mutandis*, viz:——"Whereupon he says that the said S, the father, or other ancestor, &c, was seised of the messuage aforesaid with the appurtenances in his demesne, as of fee in time of peace, in the time of the lord the now king, by taking thereof the explees, &c. and which after a demise, &c. and thereof he brings suit, &c." Count.

Note, there is no count in the old or new book of entries, but in the writ of *consimili casu* which is of the same nature with this writ, being for him in reversion during the life of any other tenant for life, as this is during the life of tenant in dower. No count in the book of entries.

The process is *grand cape*, and *petit cape*, *view*, *voucher*, and *receit* lies in this writ. Procefs.

The statute of 11 *H.* 7. *c.* 20,* makes all alienations by tenant in dower void, and gives entry to him in reversion, and therefore a descent can do him in reversion no harm, though the alienee do die seised, and consequently this writ is now useless by this statute. Uſeleſs per ſtatute of 11 H. 7, c. 20.

CHAPTER XIV. (199)

Sine assensu Capituli.

VID. F. N. B. 194. *Fr.* This writ is now out of use by virtue of the statute of 13 *Eliz. c.* 10. which restrains alienations by several bodies corporate. Uſeleſs per ſtat. 13 Eliz. c 10

CHAPTER XV.

Entry in consimili casu.

1. THIS writ is given by the statute of *W.* 2. *c.* 24. which wills, that as often as it shall happen in the *chancery* that in one case a writ is found, and in the like case falling wanting the same remedy, Where lies. W 2 c 24

* 1 Rev. Laws, 525.

the clerks of the *chancery* shall agree in making of the writ.

Why given and how framed per ſtat. W. 2. c. 24.

2. Now the writ in *casu proviso* before mentioned, being given by the statute of *Glocester* in case of an alienation by a tenant in dower, and not in any other case of a tenant for life, or by the courtesy or the like (which were of equal mischief) there this writ was framed by the clerks of the *chancery* by virtue of the said statute of *W.* 2. *Vid. Co. Lib.* 8. *Webb's case. Co.* 2 *Inst.* 407.

Writ. Count, &c. the ſame with the preceding writ.

3. The writ, count, and other proceedings are the same with the writ of entry in *casu proviso, mutatis mutandis.*

Suppoſes the tenant aliened in fee, not material though for life, &c.

4. The writ in this, and the writ next before do suppose the tenant for life hath aliened in fee, but that is not material, for if it be in fee, in tail or for life, it is a forfeiture of his estate. *F. N. B.* 515.

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Whether he in reverſion in ſome caſe be not forced to this action at this day.

Quær. whether he in reversion be not at this day put to this writ where any other tenant for life doth alien (other than tenant in dower) by fine or feoffment, if the alienee die and a descent be cast before entry of him in reversion. It is true, that in case of a disseisin no descent shall take away an entry, unless the disseisor had peaceable possession for five years next after the disseisin by the statute of 32 *H.* 8. 33.* but this (I conceive) extends not to descents where the ancestor comes in by title and conveyance.

Stat. 32 H. 8. c. 33.

Perſons now uſually enter preſently.

But persons are now usually quick in their entries, and tenants for life seldom now presume to make such alienations, and therefore both these writs are now out of use, especially the writ of entry in *casu proviso*, and therefore the pleadings are of no im-

* 1 R. L. 82.

port, neither are there any peculiar to them but what may be pleaded in other real actions.

And now we come to writs possessory ancestrel, as *Ayel, Besayel, Cosinage, &c.*

CHAPTER XVI.

Ayel, Besayel, Cosinage.

Where they lie.

1. THESE writs lie where the grand-father, great grand-father or other collateral cosins (other than the father, mother, brother, sister, uncle, aunt, nephew or niece, for of them an assise of *Mortdancester* lies) die, being seised of lands or tenements in fee-simple the day of their deaths, the heir shall have these writs against him that abates and enters upon the heir. *F. N. B.* 221. *a. b. French.*

Stat. Glocestar, c. 6.

Vid. Stat. Glocester, c. 6. *and Co.* 2 *Inst.* 308. How nephew and niece may join in these actions as well as in *Mortdancester.*

The writ is thus,——— (201)

Original.

" The king to the sheriff, &c command A that justly, &c. he render to B one messuage with the appurtenances in E, of which W, the grand-father of the said B, or grand-mother of the said B, or great grand-father, or great grand-mother of the said B, whose heir he is, was seised in his (or her) demesne as of fee, upon the day on which he died, as he saith, and unless he will do it, and the aforesaid B shall make you secure, &c. then summon, &c. the aforesaid A, &c." *F. N. B.* 221. *a. b. French. Co.* 2 *Inst.* 399. *Reg.* 226.

The count is as followeth, *viz.*———

Count.

And whereupon he saith, that the said W, the grand-father, &c. was seised of the messuage, &c.

in his demesne as of fee in time of peace, in the time of the lord the now king, by taking thereof the explees to the value, &c. and from the said W, the grand-father, &c. descended the right, &c. to the said C, who now demands as cousin and heir of the said W, to wit, the son of T, the son of the said W, &c. from whom, &c. and thereof he brings suit, &c.

Or thus,——

Count where the ancestor dies seised.

Whereupon he says, that the said W, the grand-father, was seised of the said messuage with the appurtenances, &c. and of such estate thereof died seised, &c. and from the said W descended the fee, &c. to one N as son and heir, &c. and from the said N descended the fee to the said C who now demands, &c. as son and heir, &c and from whom, &c. and thereof he brings suit, &c. *Rast. Entr.* 28.

For the count in cosinage, *vide Rast. Entr.* 28. *b.* 29. *a.*

Stat. W. 2. 20. What may be inquired by this statute.

5. By the statute of *W.* 2. *c.* 20. the tenant may alledge in these writs that the demandant is not next heir to the ancestor who died seised, and pray the same may be inquired by the inquest as in *Mortdancester*, and if this be found against the demandant, it is peremptory. *Co.* 2 *Inst.* 399. and 400.*

Parol shall not demurr.

6. The parol shall not demurr for the nonage of the demandant by the statute of *Glocester*, *c.* 2. *Co.* 2 *Inst.* 290 †

Proces.

7. The process is *grand cape*, and *petit cape*.

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* 1 R. L. 89. † 1 R. L. 90.

8. *View, receit, voucher*, lies in these writs. *Rast. Entr.* 28, 29.

The ancient jurisdiction of the court before the chief justice of *Chester* further appears by the records following, *viz.* Court of Chester.

At a county court on Tuesday next after the feast of St. Barnabas the apostle, in 26th year of *E.* 1.

Chester, ss. A writ of *ayel* by Urian the son of John de St. Peter against John the son of Reginald de Gray, for the manor of Anderton, and one hide of land in Faddelgh.

The tenant pleads he claims nothing but as guardian " by reason of the minority of the said Urian by the grant of the lord the king, &c. because he says that the manor of Anderton is held by the lord the king, by the service of the fifth part of a knight's fee."

Urian says that the said manor is held " of the lord the king by service of one pound of pepper per annum in lieu of all services, and not, &c. and that the hide aforesaid is held of Robert de Praiers by service of 12*s.* per annum, &c. and not of the lord the king.

The recognitors find the tenure for the said Urian, and judgment is entered for the demandant.

At the same county court, 26 *E.* 1.

Chester, ss. There is another writ of *ayel* between the same parties as heir to " Idonea the daughter of David de grand-mother of the said Urian for the manor of Peckforton with the appurtenances, one mill and the half of a mill with the appurtenances

in Bestan, the fourth part of the manor of Fulwick, one salt pit, and the half of a salt pit in Wico malbano"

The tenant pleads the same plea as in the former.

"*The demandant replies, that the manor of Peckforton is held of one* Cudugon de Hynton or Hilton by services of one pair of gloves per annum for all services, and not, &c. and that the one salt pit and the half of a salt pit are held of Robert de Praiers
(203) by service of one penny in soccage, and that the mill and the half of the mill are held of the heirs of Richard de Bunbury, Roged de Walaston and Margaret his wife, in soceage, and not, &c. and the said fourth part of the manor of Fulwick is held of Richard de Sutton and Isabella his wife, by the service of one pair of gloves per annum for all services, and not, &c."

The recognitors find the tenure for the demandant, and judgment for the demandant, *Miasericordia condonatur*.

Pleas in these actions.

Abatement. 1. *Abatement, vide antea.* Entry pending the writ a good plea in abatement. *Rast. Entr.* 30. *a.*

Bar. 2*ly*. *Bar*, The common plea in bar is that the ancestor was not seised the day of his death, or that he died not seised. *Rast. Entr.* 28. *b.* 2. and 29 *a.* 5. 6. Yet it is said that the dying seised is not traversable, but the dying seised the day of his death. 40 *E.* 3. 38. 13 *E.* 3. *Br. Cosinage*, 10.

Bastardy. 3*ly* Bastardy in the demandant is pleadable, but this is common to other real actions. The trial of

bastardy, *Rast. Ent.* 29. *b.* 7. In the county court of Chester. 35 *E.* 1 Writ to the archdeacon of *Litchfield* and *Coventry* to certify bastardy, "between Hugh Pulford and Richard Longnour, and Agnes his wife in a writ of cosinage" of lands in Pulford.

4*ly*. a release with warranty is no plea without traversing the dying seised, (but *quere* whether the dying seised ought not to be traversed, or only the seisin *die quo obiit*) for he might be disseised the day of his death, and at another part of the day make the release, and then the release and warranty may be a bar. *Vide* 40 *E.* 3. *f.* 19. 11. *Br. Cosinage*, 10. Release with warranty.

5*ly*. The tenant may plead that the ancestor had two sons, and that the demandant is of the younger brother, and the tenant of the elder, and so in all these writs he may falsify the descent by the pedigree. 11 *H.* 4. 56. *Br. Cosinage*, 2. 4. Demandant younger son.

These writs may be brought at this day, but the entry not being taken away, the *ejectione firmæ* is now commonly used to gain the possession, and these actions are now out of use. (204) May be brought at this day. Eject' firmæ.

Having now gone through with those writs called real *precipes quod reddats*, we come in the next place to those real writs which though they demand lands in demesne, yet contain no express demand in the writ, *i. e.* no number of messuages or acres, &c. And these are *nuper obiit*, assise of *mortdancester*, and assise of *novel disseisin*.

In the first and last, there are no certain numbers named in the writ, and in the *mortdancester* the process is different; but where there in no certainty in the writ, there must be a plaint or demand wherein the certainty may appear, as a plaint in assise thus, Plaint in assise.

Certainty in plaint or demand.

viz:——"And whereupon the same B by his attorney complains that they have disseised him of one messuage, &c." In the *nuper obiit*, a demand thus:——"A B and L C by their attorney, demand against M, one messuage, &c." *Rast. Entr.* 73 and 440. *b.*

CHAPTER XVII.

Nuper Obiit.

Where it lies.

1. THIS writ is where the grandfather, father, &c. or any other ancestor of the demandant dies seised of the land in fee-simple, and one of the heirs enters, and holds the other out, as in case of coparceners, or heirs in *gavelkind*, if one enter and ousts the other, the rest, he or they who are ousted, may have this writ against the other. *F. N. B.* 490.

(205)

2. The writ is thus,——

Original.

"The king to the sheriff, &c. If A and B shall make you secure, &c then summon, &c. C that he be before our justices at *Westminster* such a day, &c. to shew wherefore she deforceth the aforesaid A and B, of their proportionable part which falleth to them of the inheritance which was W's of N the father, mother, or other ancestor of the aforesaid A B and C whose heirs they are, and who lately died, as it is said, &c. and have there the summoners and this writ, &c. Witness, &c." *F. N. B.* 197. *Reg.* 226.

Difference between this writ and the writ de rationabili parte.

3. This writ and the writ of right *de rationabili parte*, are of affinity, for both are for the recovery of land by one coparcener against another, and lie in privity. The difference is, that the writ of right may be brought if the ancestor was seised at any time, but in the *nuper obiit*, the ancestor must die seised. *Reg.* 226. *vide antea.* 134.

4. The count.——"And whereupon they say that the said W (father mother or uncle &c.) was seised of the whole of the said tenements with the appurtenances whereof &c. in his demesne as of fee and right in time of peace in the time &c. by taking thereof the explees, &c. And thereof lately died seised &c. And from the said W descended the right &c. to the said A & B who now demand together &c. And the said C as daughter and heir &c. which said C the whole of the said tenements now hold and the same A & B of their proportionable part thereof deforceth &c. and thereof they bring suit &c. *Rast. Entr.* 440. *Note*, there is a demand to be made of the certainty of the messuages, &c. before this count." *Rast. ibidem.* Count.

5. *View*, nor *voucher* lies in this writ. *Quere* of *view* for I conceive it lies by Stat. of 12 *E.* 2. View, voucher, &c.

6. The process is *grand cape* and *petit cape.* Process

Pleas in this action.

1. *Non-tenure*, or several tenancy are no pleas in this writ, because of the privity of blood; but if the tenant claim by purchase or disclaim in the blood, then he may plead these pleas in abatement. *F. N B.* 492. 197. *Fr. b.* 7 *H.* 6 8. If the tenant disclaim, the demandant may have a *Mortdancester* for the whole, (*o* 1. *Inst.* 2*ly.* In bar may be pleaded a feoffment, and traverse dying seised. *Rast. Entr.* 441. Non tenure &c no plea. (206) Bar.

This action is out of use (as others) where the entry is not taken away, and the coparcener ousted, might have an assise (as I conceive) against the other at common law. *Vide Co.* 1 *Inst* 167. *b.* Now not in use

What judgment in this action.

Vide Co. 1 *Inst.* 167. The judgment shall be to have her part, and not in severalty; though some books say in severalty.

CHAPTER XVIII.

Assise of Mortdancester.

Where it lies.

THIS writ lieth where the father, mother, brother, sister, uncle, aunt, nephew or niece, die seised the day of his death of lands, rents or hereditaments in fee-simple, and a stranger abate after their death, the heir shall have this writ. *F. N. B.* 195. *Fr.*

2dly. The writ is thus.——

Original.

"The king to the sheriff of S greeting: If A shall make you secure, &c. then summon &c. twelve free and lawful men of the neighbourhood of N that they be before our justices at the first assise, when they shall come into those parts, *or* before our justices at *Westminster* on the octave of, &c. *or* before our beloved and faithful D and E and those whom we have associated unto them, at a certain day and place, whereof they the said D and E shall give you notice ready to recognise by oath, if W father of the aforesaid A or mother, sister, brother, uncle or aunt, was seised in his (or her) demesne as of fee, of one messuage with the appurtenances in N, the day whereon he died, and if he died after the coronation of lord king Henry; and if the same A be his next heir: and in the mean time let them view the said messuage and land, and cause their names to be put in the writ, and summon by good summoners B who now holds the aforesaid messuage and lands, that he may be there to hear that recognizance; and have there the summoners and this writ. Witness, &c." *F. N. B.* 195. *Reg.* 223. *b.*

This writ is when the assise is returnable before special commissioners, but may be returnable before justices of assise or justices at *Westminster*. *F. N. B. ibidem.* Special commissioners.

The commission for special commissioners, vid. *Reg.* 223.

3dly. There are three points in this writ to be inquired of by the jury. 1, If A father or mother, &c, was seised in his or her demesne as as of fee on the day of his or her death. 2. If he died within the time of limitation as within 50 years, &c. 3. If the demandant be the nearer heir. Three points to be inquired.

4thly. But these points are not to be inquired of if the tenant pleads in barr of the assise. i. e. some other matter, as a release, a warranty, &c. out of the three points of the assise, for then upon issue joined, the trial is peremptory, and the jury shall not inquire of the three points, and such pleas always begin *assisa non*, &c. *Co.* 2 *Inst.* 399. Where the 3 points are not to be inquired.

5ly. But if the tenant make default, yet the three points shall be inquired, and unless they be found for the demandant, he shall not recover. *Co. ibid.* Where to be inquired in case of default

6ly. If the tenant appear, and say he is ready to hear the recognizance of the assise of one of the points in the points in the writ, or traverse one of the points in the writ, or plead in abatement, or vouch, and the demandant counter-plead the voucher and these pleas be tried, and adjudged for the demandant, yet the court *ex officio* ought to inquire of all the points in the writ. *Co. ibid. vide Dyer* 310. *Finches law.* 93. 2. *E.* 3. 47. *b.* 9. *E.* 3. 349. 10. *E.* 3. 393. 9 *Assise.* 17. & 40 *E.* 3. 48. 39 *Assise.* 13 8. *Assise* 17. Where to be required in other cases.

Lies though the demandant's anceſtor was a diſſeiſor.

7ly. This writ lies, though the ancestor was in by diſſeisin. *Ass. pl.* 3.

Certificate, &c. Si non omnes, &c.

8ly. In this action, a certificate, writs of association, and *Si non omnes*, &c. may be had as well as in assise of *novel disseisin*, for which see more in assise *de novel disseisin f. F. N. B.* 196 *fr.*

(208) Proceſs.

9. The process is *summons* and *resummons*, and upon default at the return of the *resummons*, *capiatur assisa*, the inquest shall inquire of the three points. *F. N. B. ib. Rast, Ent.* 435. *b.*

Count muſt ſhew how heir

10. In the count in this writ the demandant must shew how he is heir, i. e. how cousin by the pedigree. 2. *Ass. pl* 15.

Eſſoin. W. 1. c. 42. W. 2. c. 28.

11. Neither tenant or demandant shall be essoined in this writ after appearance, and therefore they must essoin the first day. *Stat. W.* 1. *c.* 42. *W.* 2. *c.* 28. *Co.* 2 *Inst* 248.

Whether now in uſe ſince ſtat. H. 8 of wills.

12. Qr. whether since the stat. of *H.* 8. whereby lands are deviseable by will, this action be altogether useless, because it did not lie for lands devisable by will before the statute. *F. N. B. ibid. vid. Leon.* 1. *p.* 267, it seems it does lie still.

Pleas in this Action.

Abatement.

1. *Abatement.* That another or the demandant was last seised, is a good plea in abatement. 5. *Ass. pl.* 1 *Br. Mort.* 16. *Br. Mort.* 27.

Baſtardy.

2 *Bar.* Bastardy may be pleaded in bar though it be a possessory action. 1 *Ass. pl.* 15. *Br. Mortdancester* 13.

Nontenure and over, &c.

He may plead non-tenure, and over to the assise, 2. *Ass. pl.* 10. 10.

4. A lease for years may be pleaded in bar. 36 *Ass. pl.* 6. Leafe for years

5. So of a feoffment with a traverse of the seisin. But if a fine or recovery be pleaded, the seisin needs not be traversed, because it shall never be intended that the ancestor was seised against matter of record. 6 *E.* 4. 11. *Br.* 52. *Mort.* Feoffment. Common recovery. Fine.

At a county court on Tuesday next after the feast of St. Barnabas the apostle in the 26th year of Ed. 1. (209)

Chester ss. An assise of Mortdancestor by Urian de St. Peter against John the son of Reginald de Gray of the half of the manor of Bonbury the fourth part of the manor of Beston and the fourth part of the manor of Spurstow.

The tenant pleads he claims nothing but as guardian, "by demise of the lord the king of the land held by military service."

The plaintiff replies that the moiety of the manor of *Bonbury* and the fourth part of the manor of *Beston* are held of *Edwin* the son of *Philip Burnell* by service of one arrow per annum for all services and the fourth part of the manor of *Spurstow* is held of one Hona ap Eignon and Allice his wife, by the service of one penny per annum for all &c. and not of the lord the king by any military service.

The jury found the land as the plaintiff alledged. Judgment for the plaintiff.

At the same county court.

Chester ss. Another by John Cherlton upon the death of Thomas of Cherlton his father of one mes-

suage, 8 acres of land, 2 acres of wood-land, one acre of moor with the appurtenances in Weston near Bertomlegh against Simon of Cherlton and Emma his mother.

The tenant pleads not seised on the day &c. Found for the plaintiff, judgment for him.

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CHAPTER XIX.

Assise of Novel dieseisin.

Where lies.

1. AN assise of *novel disseisin* lies where a man is tenant in fee-simple, tail or for life, is disseised and ousted of his possession, he may recover his possession by this action. *F. N. B.* 437.

Why so called

2. It is called an assise from the *French* word *assis, i. e. assessum locatum*, either because they settle the possession, or because they were anciently executed at a certain time and place. *Vid. Blunt's diction.* assise of *Utrum*. And they were called assises of *novel disseisin, i. e.* of a late or new disseisin done since the last *eyre*, for if it were done before, the action was gone, and every *eyre* was from seven years to seven years. *Co. 1 Inst.* 153. *b.*

Jury appears the first day

3. In the proceedings in this action, the original commands a jury to appear the first day, who are called (*recognitors* of the assise) it may be returnable before the judges of the *common pleas*, or *king's bench*, if the *king's bench* be in the county where the lands lie, or otherwise in the *common pleas*. *F. N. B.* 437. or they may be returnable before justices in *eyre*, or justices of assise by the statute of *W.* 2. *c.* 13. without any patent.

Special Commissioners

4. There is a way of proceeding before special commissioners which is called a special assise, and in that case there must be a special patent directed to the justices. *F. N. B.* 439. And in this special

assise there may be a writ of association of assise in nature of a patent, and a writ of *Si non omnes*, &c. sued forth by the plaintiff if he please. *F. N. B.* 462.

5. The original writ is thus. "The king to the sheriff, &c. A hath complained unto us that B unjustly and without judgment hath disseised him of his freehold in C within 30 years last past, and therefore we command you that if the aforesaid A shall make you secure to prosecute his claim, then cause that tenement to be re-seised, and the chattels which were taken in it, and the same tenement with the chattels to be in peace until the first assise when our justices shall, come into those parts, and in the mean time cause twelve free and lawful men of that visne to view that tenement, and their names to be put into the writ, and summon them by good summoners, that they be before the justices aforesaid, at the assise aforesaid, ready to make recognizance thereupon, and put by gages and safe pledges the aforesaid B, or, if he shall not be found, his bailiff, that he may be then there to hear that recognizance, &c. And have there the summoners, the names of the pledges, and this writ, &c." *F. N. B.* 1776. *Reg.* 196. Original. (211)

6. This writ is made returnable before the justices of assise. If it be returnable before the king in *Banco suo* or justices of *C. B.* then the writ in that is to be altered *quod vide Reg. ibidem.*

7. From the frame of this writ there are these four things to be observed: 1. That the sheriff is to take security of the plaintiff to prosecute, or he may give security in *chancery*. 2. Formerly the sheriff was to reseise the land and all the cattle upon it, and keep all in his hands to be answerable to the party that should recover, and not suffer the disseisor Four things observable from the writ.

to alienate the land, and this was for the preservation of the peace by virtue of these words in the writ, and the tenements and the chattels taken in it to be re-seised, &c. but now it is otherwise, for the plaintiff shall recover damages by the verdict of the assise. 3. That the jurors, the recognitors of the assise should view the land, or other thing whereof the disseisin is complained, and this must be done by seven at the least of the jury, *per Fleta.* 4. That the jury is to appear the first day. 5 That the process against the jury is summons, and against the party and his bailiff an attachment by his goods or lands, and if he do not appear, the assise shall be taken, *Vide Fleta. Lib.* 4. *c.* 5. 222. *and Chap.* 7.

Of what it lies. 8. It lies of any thing that a *præcipe quod reddat* lies at common law. But by the statute of 32 *H* 8. *c.* 7. it lies of a parsonage, vicarage, tithes, &c. and by *W.* 2. *c.* 25. of profits apprender, as of *Estovers, de nucibus, glandibus, &c. in alieno Solo. vide* Co. 2 *Inst.* 412. It lies of offices.*

(212) 9. The plaint in assise is as a count in other real actions, for there is no count besides, and is as followeth, *viz.*—

Plaint. The assise comes to recognise if A unjustly, &c. disseised B of his freehold in C within thirty years now last past, &c. and whereupon the same B in his proper person complains that A hath disseised him of the said messuage one hundred acres of land, &c. with the appurtenances in D, &c.†

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* 1 R L. 82. In what cases novel disseisin shall lie.

† In an assise for a thing of common right, the plaint as well as the writ shall be general as in an assise for a manor, lands, meadow, wood, etc. 1 Sid. 73 But in an assise for things against common right, the plaint must be special, and the plaintiff shall make title by it as in assise for a common office, etc. Dyer 114 b, 152 b, 153 a. 1 Sid. 73. 3 Mod. 273.

Note, this limitation within thirty years is by virtue of the statute of 32 *H.* 8. *c.* 2.

10. In this action, there are some special things worthy to be considered. 1. What is meant by taking the assise. 2. What it is to take the assise at large. 3 What it is, and when a man may say *venit assisa super titulum.* 4. When the inquiry shall be in *modum assisæ.* 5. When in *modum juratæ* or *qualiter assisa vertitur in juratam* as *Fleta* expresseth it. Special things observable in this action.

1. As to the first, the taking of the assise is the swearing of the recognitors to inquire of the points of the assise, *i. e.* of the seisin and disseisin, and in such case the recognitors are sworn to that effect. But if any other matter be pleaded in abatement or in bar of the assise, as villenage in the plaintiff, release, agreement, warranty, &c. and are at issue out of the points of assise, &c. *i. e.* upon some other collateral matter, then the recognitors are sworn only as another common jury, *i. e.* to try the issue, &c. and therefore the tenant always begins his plea in bar *assisa non*, &c. *Fleta Lib.* 4. *c.* 9. *p.* 235. and *c.* 11. *p.* 238. *Co.* 2 *Inst.* 399. 1. Taking of the assise, what it means.

2. To take the assise at large is to take a special verdict of the recognitors of the assise, finding not only the seisin but the special manner of the entry, and so leaving it to the judgment of the court whether there be any disseisin or not, *Litt. sect.* 366. but this is common with other actions. But to take assise at large, peculiar to an assise is, 1. Where the recognitors are bound to find and inquire after other matters besides the seisin and disseisin, as where an infant brings an assise, and the feoffment of his ancestor is pleaded against him, the assise then shall be taken at large, *i. e.* to inquire not only of the points of the assise, but whether the ances- 2. Taking the assise at large, what.

tor were of age, of good memory, out of prison when he made the deed pleaded. 26 *Ass.* 5 *Kitchin f.* 66. 2. Another sense of taking the assise at large is when the reeognitors shall only inquire of the seisin and disseisin, and damages, and not of the plaintiff's title, as where the tenant makes default. *Pl. Com.* 415. 22. *Ass.* 11. 36. *Ass.* 29.

Venit le assise sur le title what

3. As to the third, *venit le assise sur le title, &c.* this is a plea for the tenant when the plaintiff hath made a title at large, without answering to the bar pleaded before by the tenant as in some cases he may, then the tenant may pray that the assise may be taken upon the title, *i. e.* That the recognitors may inquire of all matters and circumstances concerning the title, but if the plaintiff traverse the bar, and they are at issue, nothing can be inquired but the bar which is traversed, and not the title to be inquired after, for the title in such case is but to induce the traverse of the bar, 5 *H.* 7. 29. *b.* *Vide* there where the tenant may plead *venit assisa super titulum*, and where not, 30, 31, 32, 33. & 21 *E.* 4. 31. For example, if the tenant plead that his father was seised and died seised, and he entered and gives colour to the plaintiff, if the plaintiff reply that the father of the tenant infeoffed him, and traverse the dying seised, upon which they are at issue, the dying seised shall only be inquired and not the plaintiff's title *i. e.* the feoffment; but if the plaintiff make a title at large and say, that after the descent his father entered by a stranger and died seised, and he entered, then the tenant may plead *venit assisa &c. ibidem.* So that in short, when the plaintiff does not traverse, but confess and avoid the bar by making a title to himself, the tenant may say, *venit assisa super titulum, &c.*

Where venit le assise fur, etc

When assisa vertitur in juratam.

4. As to the fourth, when *assisa vertitur in juratam*, the assise is said to be turned into a jury when

they are to inquire of matters put in issue out of the point of the assise, *i. e.* out of the point of seisin and disseisin) which points must first be determined before the assise can be taken as to the seisin and disseisin, as if the tenant plead in abatement to the (214) writ, as villenage, &c. or other matters triable by a jury, and issue is taken, or matters in barr, as a release, agreement, &c. *Vid. Fleta Lib.* 4. *c.* 10. and the assise is said to pass in *modum juratæ:* so if a foreign matter be pleaded in a foreign county, that must be tried by a jury before the assise can be taken, and in such case the assise is adjourned and the record sent to the *common pleas* for the trial of the foreign plea, and this called *assisa extra assisam*, or in *modum juratæ*. *Bract. Lib.* 4. *P.* 1. *c.* 34.

5. There are several things specially observable in pleading in this action. 1. In pleading a title in bar, colour must be given by the plaintiff, 21 *E.* 4. 82. 21 *E.* 4. 5. *Dr. & St. c.* 53. 158. *Co. Lib.* 10. 90. *a. Leyfields* case. 2*ly.* The tenant may plead in abatement, and over in bar, or take the general issue *nul tort*, *nul disseisin*, 12 *E.* 2. *juris utrum* 12. 40 *E.* 3. 29. *Finch Ley* 385. 3*ly.* The plaintiff may traverse or confess and avoid the bar, or in most cases (where the tenant pleads in bar) may in his replication make a title at large without answering to the bar, *vid. antea* 5 *H* 7. 29, 30, 31. &c. 4*ly.* Where the plaintiff makes a title at large, the tenant may in his rejoinder say, *venit assisa super titulum*, &c. and not be forced to maintain his bar. 5 *H.* 7. *ibidem*, and 15 *H.* 7. 13. 5*ly.* Before verdict, the count or plaint may be abridged as if the plaint be of land or rent, he may abridge it for the rent. So of two manors he may abridge it for one, 14 *Ass.* 9. 4 *E.* 4. 33.

Observable things in pleading in this Action
1. Colour
2. Abatement and over in Bar.
3. Title at large.
4. Ven Assise, &c.
5. Abridgment of the Plaint.

6. No *essoin*, *voucher* or *receit* lies in this action, unless the vouchee be party to the writ and appear

No Essoine, Voucher, Receit lies.

presently and enter into the warranty. *Co.* 2 *Inst.* 249 & 411.

Plea in Abatement first to be tried.

7. Where the tenant pleads in abatement and over to the assise, the plea in abatement must be first tried, but never no issue taken upon it or answered. 7 *E.* 6. *Pl:* 91. *Finch's Law*, 416.

Where Title cannot be made at large.

8. If the tenant plead a recovery, fine, grant of the reversion and attornment in another county in bar, the plaintiff cannot make a title at large, but must answer the bar, and if the plaintiff make a title by a fine, or recovery, the tenant cannot plead *venit assisa super titulum*, &c. because these matters are not triable by the assise. 5 *H.* 7. 29.

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Where in case of an infant the Affise shall be taken at large. Vid. Kel. 111. a.

9. If an infant bring an assise, if a matter in abatement be pleaded against him, or the deed of his ancestor in bar, not only the seisin and disseisin, and the point in issue shall be inquired, but all other circumstances, *i. e.* whether the ancestor was of age, out of prison, &c. which is taking the assise at large as before, *f.* 214 Otherwise in a writ of entry *sur disseisin*, or other *præcipe qd. reddats*, for there the point in issue and no other shall be tried. 11 *Ass.* 6. 48 *E.* 3. 33. 9 *E.* 4. 34. So if any matter of record be pleaded against the infant in assise, that must be answered, and the jury shall not inquire of the circumstances. 48 *E.* 3. 33.

Infant plead nul tort, etc.

10. If the infant plead to the assise at large, *i. e.* *nul tort nul disseisin*, and a title be pleaded against him, all the circumstances shall be inquired, otherwise if he plead in bar. 28 *Ass.* 21.

Force ro be inquired ex officio.

11. The jury *ex officio* ought to inquire of the force in assise, but if they do not, it is no error. *Co.* 2 *Inst.* 236.

These matters are more fully spoken of in the supplemental tract, which I have added to this treatise at the end of it, and therefore I shall only say something of a certificate of assise and set down some entries of records in this action. Supplemental tract.

Certificate of assise is a writ for the party grieved by a verdict or judgment given against him in an assise when he had something to plead, as a record or release, and it was not or could not be pleaded by the baily of the tenant in his absence, or in case the assise was taken by default, by this writ the tenant shall have the deed tried, and record brought in before the justices, and the former jury shall be summoned to appear before them at a certain day and place for a further examination and trial of the matter. *Vide F. N. B.* 447. *Co.* 2 *Inst.* 414. Certificate of assise.

There are two sorts of certificates of assise, one at common law, and this was after verdict or before, and after judgment when the verdict was not well examined by the justices, the justices *ex officio* might examine it, and in that case the same recognitors must be summoned, and if any of them died, the certificate at common law had failed, *Co.* 2 *Inst.* 415. The other by the statute *W.* 2. *c.* 25. that is after judgment when the baily had appeared, and the assise had found against him, whereas the tenant himself had a record to plead, or a release which the baily could not plead though he had offered to plead the record, but had not the release, in such case the tenant shall have a writ of certificate of assise returnable before the same, or other justices, whereby the recognitors of the former assise and the plaintiff shall be summoned at a certain day and place, &c. And this extends to all, 1. *Novel disseisin* 2 *Juris Utrum.* 3. *Darreine presentment.* 4. *Mortdancester.* *Co.* 2 *Inst.* 415. The certifi- (216) Two sorts of Certificates of Assise. W. 2. c. 25.

cate must be sued and judged where the assise was sued. 12 *H.* 4. 20. 26 *Ass.* 5. *Co.* 2 *Inst.* 416.

The writ of certificate at common law is thus:—

Writ. of Certificate.

"The king to the sheriff, &c. Because certain doubts are arisen upon some articles touching the assise of novel disseisin which by our writs was summoned between A and B, and taken before our beloved and faithful H and R, at N, of tenements in I, as from the complaint of him the said A we have received information, we have constituted the aforesaid H and R, *or thus*, the aforesaid H and our beloved L, *or thus*, our beloved and faithful N and S, our justices, together with those whom we have associated unto them to take the certificate thereupon: And therefore we command you, that at a certain day and place whereof the aforesaid N and S shall give you notice, you cause to come before them the jury of that assise, to certify them upon the articles aforesaid, and summon, &c. the aforesaid B that, &c. before, &c. to hear that certificate; and have there the names of the jury and this writ." *F. N. B.* 181. *e*. *Reg.* 200. *a*. *vide ibidem*, the writ upon the statute. *Vide plus* in the supplement.

(217) *Assises in the County Court of Chester.*

At a County Court, &c. next after the feast of St. Luke the Evangelist, in the year of the reign of King Edward I. the 26th

Chester, ss. "*An assise* by John del Holt of his freehold in Hunterston, that is of one messuage, two tofts, twenty acres of land, twenty acres of woodland, eight acres of waste land, and the sixth part of one mill in the same vill, against John the son of William Friend and Richard his brother."

The one pleads *non tenure*, and *nul tort* the other. John pleads tenancy in common, and over in bar a descent, and the plaintiff replies at large, that he was in quiet possession for four years till disseised by the tenant, and judgment for the plaintiff upon the verdict of the recognitors.

At a County-Court on Tuesday next after the feast of St. Barnabas the apostle, 26th Edward I.

Chester, ss. "Assise by Adam de Burcheles against Alan de Asthull, and John his brother, and Jordan his brother, of one messuage, six acres of land, and one half acre of meadow with the appurtenances in Burcheles.

John and Jordan plead non tenure and that they have done no injury, &c. and pray that it may be inquired of by the assise. Alan as tenant pleads in bar the feoffment of the plaintiff, the plaintiff traverseth the bar, and found for the defendant, and judgment for him."

At a County Court on Tuesday next after the feast of St. Barnabas the apostle, 26th Edward I.

Chester, ss. "Assise against William Lancellyn, Henry the son of Robert de Tnemele, Bigertham who was the wife of Roger le Mowere and John de Redeoks, by Nicholas the son of Richard Textor and Lucy his wife, of one messuage with the appurtenances in upper Bebington.

William Lancellyn pleads *non tenure* and *nihil clamat* but the foundership, the house being an hospital for poor people, founded by his ancestors, and (218) that he hath done no injury, &c. he others plead as tenants in abatement, that the house is in *Pulton* and not in *Bebington*, and over in bar, and pray the

assise, *ideo capiatur assisa*, &c. and the recognitors found the house was in *Pulton* and not in *Bebington*. Judgment that the defendant go thereof without day; and the said John and Lucy in mercy &c. pardoned because poor."

The proceedings and pleadings were very concise and summary in those times of E. 1. I shall only set down one at large as it is in the record, viz. That of Adam de Burcheles before mentioned.

Chester, *ss*. "The assise came to recognize if Alan de Asthull, Robert his brother, and Jordan his brother, disseised Adam de Bercheles of his freehold in Burcheles aforesaid, &c.

And whereupon he complains that the said Alan Robert and Jordan disseised him of one messuage, six acres of land, and one half acre of meadow with the appurtenances in Bercheles.

And the said Robert and Jordan come and say that they have nothing in the said tenements, nor do they claim any inheritance therein, and that they have done no injury nor disseisin, and they pray that this may be inquired of by the assise.

And the said Alan who is tenant of the said tenements comes and says that the assise ought not to proceed, for he says that he is seised of the said tenements by the gift and feoffment of the said Adam, who hath brought this assise, for eight marks of silver which he hath payed into his hands, and afterwards did thereof homage to the chief lord of the fee; and this by the writing of the said Adam which he brings that it may testify hereof.

And the said Adam says that he entered by disseisin, and not by the said writing, and this he prays

may be inquired of by the assise. And Alan likewise, &c.

The jury upon their oaths say, that the said Alan, Mis. ij e. Robert and Jordan have done no injury nor disseisin Therefore it is considered that the said Adam take nothing by his said writ, but be in mercy from his false claim. And that the said Alan and the others go quit thereof without day."

In the time of *E.* 4. There was an assise brought against the mayor and citizens of *Chester*, for lands upon *Hole Heath*, which I have the rather taken notice of because of late years there have been suits by the earl of *Shrewsbury* against the said citizens concerning their title to the said lands. And these records set forth their title of commoning. The record in substance, is to this effect, *viz.* (219) Mayor and Citizens of Chester.

Chester ss. Pleas in the county court of Chester, at Chester before Thomas Lord Stanley knight, justice of the lord the prince, on Tuesday next after the close of Easter in the 22d, year of Ed. 4th.

It is brought by *Richard Cholmondelay* for dissiesing him of his freehold in *Hole*, *i. e.* 20 acres of land.

The mayor and citizens plead that the city of *Chester* is an ancient city time out of mind, corporated of a mayor and commonalty, and that *E.* 1. was seised of the county of *Chester*, of which the city is parcel in the right of his crown in fee, and had common for himself and all his tenants inhabiting within the city of *Chester* in a place called *Hole Heath*, and that *E.* 1. by his charter dated at *York*, 12 *June in the 28th. year of his reign* gave the city of *Chester* to *John Arneway* then mayor of the city of

Chester, and to the commonalty of the same city and to their successors, *yielding* to the king and his successors, 150*l. per annum* at the *exchequer* at *Chester* at *Michaelmas* and *Easter*, by equal portions, and then shew how afterwards they have ever had common for all manner of beasts at all times of the year; and then set forth how the county descended to *E.* 4. and that he gave the county and the rent to *Edward* his son, prince of *Wales*, and so pray aid of the prince, which is granted: and then the action is continued to several counties, and *procedendo* at length sent to the justice of *Chester*, *teste at Chester*, 26th *December* 22 *E.* 4.

I shall conclude this chapter with one other record in the court of *common pleas* in the county of *Chester*, in an assise of *darreine presentment* in the time of *E.* 1. In which some things more than ordinary are observable.

(220) Pleas at Chester, on Tuesday next after the feast of St. Laurence the martyr. 26 year of Ed. 1.

Chester ss. An assise of *darreine presentment* to the church of *Astbury* by the abbot of *Chester*, against *William Venables* of *Newbolt.*

Assise of Darreine presentment.

The recognitors find as the plaintiff declared, that *Reginald*, son of *John de Gray* was the last incumbent, and presented by *Simon* abbot of *Chester*, and inquire of the *mortmaine*, and whether the said *William* was of full age, within the four seas, out of prison and of good memory, at the time of the presentment of *Reginald.*

The recognitors find for the abbot, upon the whole matter, *viz.* That *William* was under age at the time, &c. under the guardianship of one *Roger Pulesdon*, and that the said *Roger* for the

said *William* withstood the said presentation, but that *Simon* the abbot, recovered against the said *William* in an assise of *darreine presentment*, and find other presentments made by the same *Simon* and his predecessors; and find the manner of the disturbance made by the said *William* upon the said vacancy, *i. e.* That he intruded into the church and took the keys, and put 30 armed men into the said church to keep possession for him as patron, some of which continued there 15 days, and for that time would not suffer the parishioners to enter into the said church, &c. The defendant in this action made default, and judgment for the abbot. *Dam. V. marks.*

There is one writ more called a *juris utrum*, which as it is in nature of an assise, may not improperly come next in order, though as it is a parsons writ of right it might have been brought under the learning of writs of right, and with this writ I shall close this third book. Juris Utrum.

CHAPTER XX. (221)

Juris Utrum.

1. THERE are five real actions wherein a jury to try the cause are returned upon the first day, as 1. *Assise* of *novel disseisin.* 2. *Assise* of *mort-dancester.* 3. *Assise* of *darreine presentment.* 4. *Juris Utrum.* 5. *Attaint.* 6 Writs where the Jury appears the first day.

2. This is a writ for a parson at common law, and for a vickar, warden of a chancery, chappels, provosts, &c. by the statute of 14 *E.* 3, to recover their lands where the predecessor aliened them or lost them by default or reddition in a real action, or by verdict (unless it be in a writ of right) tried if the patron and ordinary were not party by *aid prayer. F. N. B.* 50. *d. Fr. c.* 48. *Reg.* 32. What.

Parsons writ of Right.

3. This is a parson's writ of right, and the highest he can have. *F. N. B.* 48. 50.

Now useless per Stat. 13 Eliz. c. 10.

But I conceive this writ is now clearly out of use since the statute that restrained all alienations by eclesiastical persons. 13 *Eliz. c.* 10. Except a parson be out of possession above 20 years, then I conceive he is put to this writ by the statute of 21 *Jam.* 1. *c.* 6. but the successor may enter, because he comes in the post.

The writ is as followeth :——

Original.

" The king, &c. If A, parson of the church of D shall make you secure, &c. then summon, &c. twelve free, &c. of the visne of D, that they may be before our justices at the first assise, &c. or before our justices on such a day prepared to recognise under oath whether one messuage &c. in E, is frank almoigne, appertaining to the church of said A of D, or the lay-fee of S, &c. and in the mean time let them view that land, and summon, &c. the aforesaid S who holds two acres thereof, B who holds eight acres thereof, C who holds five acres and one rood thereof, and D who holds four acres and three roods thereof, that they be then, &c." *Reg.* 32. *b.*

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The Entry.

The entry is " The jury comes to recognise whether one messuage, &c. in E be frank almoigne belonging to the church, &c." *Vide le count in Co. Lib. Entr.* 399.

One brought, 10 Jam.

There is one brought in the 10 *Jam.* in *Co. Ent.* but I suppose it was upon an alienation before the statute of *Eliz.*

Process.

4. The process is summons and resummons, and then if the tenant make default, the jury shall be taken. *F. N. B.* 48.

But by *Co. Entr.* 401. *a.* The jury is taken by default, without a resummons upon a default the first day. Jury taken by default without a re-summons.

5. The tenant may plead as in an assise, two or three dilatories to the writ and over in bar. *Et si ne trove soit, &c. F. N. B.* 49. Plead in abatement and over in Bar.

6. The general issue for the tenant is, that it is his lay-fee, and not the alms of the church. *Co. Entr.* 400. The general issue, what.

7. In an assise of *mortdancester*, *juris utrum*, or *attaint*, the tenant shall not be essoined after appearance by the statute of *W* 1. *c.* 42, nor the demandant after the first day by the statute of *W.* 2. *c.* 28. And therefore in Chester, upon the first day of the assises or great sessions, the prothonotary or his clerk cause a proclamation to be made, that if any person will be essoined in an assise of *mortdancester*, *certificate of assise*, *juris utrum*, or *attaint*, he must come forth and enter the same, sitting the court, or none will be received. Essoin. W 1. c. 42. W. 2. c. 28. Chester.

8. A recovery in a real action against the predecessor of the demandant, and so his lay-fee is a good plea in bar, and not double, for the *juris utrum* is a writ of right for the parson, and in a writ of right, the tenant may plead a recovery or other special matter, and conclude, "And so he hath greater right, &c." 19 *H.* 8. 7. *Br. jurisutrum*, 1 Recovery pleaded, and affirmed lay fee.

BOOK IV.

CHAPTER I.

Quare Impedit.

HAVING now gone through with real writs which concern the right, or in the right and for the recovery of lands in demesne, we proceed to those which concern the recovery of hereditaments, or for the doing or performing of other things, of which sort are, 1. *Quare Impedit* 2 *Quo jure* 3. *Quod permittat.* 4. *Breve de Medio* 5. *Breve de Consuetudinibus* and *servitiis.* 6. *Secta ad molendinum.* 7. *Warrantia cartæ.* 8. *Curia claudenda.* 9. *Partitione faciendâ.* 10. *Writ of covenant real.* And when we have done with these, we shall conclude with such writs and actions as relate to the redressing of force and fraud, and quieting of men's possessions after they have duly recovered them by law. As 1. The writ of *deceit.* 2. *Quod ei deforceat.* 3. *Entry upon the stat.* 5 *R.* 2. 7. 15 *R.* 2. 2. 8 *H.* 6. 9. 13 *El.* 11. 21 *Jac.* 15. 4. *Redisseisin and post-disseisin*, and lastly *attaint.*

What. 1. *Quare Impedit* is a writ for the recovery of an advowson, or rather a presentation of a clerk to a church, where another by a presentation hinders his clerk from being instituted upon his presentation, or where one that has no right procures his clerk admitted, *i. e.* instituted, in such case the true patron may have this writ to remove the incumbent, and to have his clerk admitted if he bring his writ with in six months next after the institution.

2. This writ lay at common law against the disturber at any time before institution, *Co.* 2 *Inst.* 360. But plenarty before the writ brought, was a good plea at common law. *Ib.*

Lay at common law before inſtitution

3. At common law there were three sorts of writs for recovery of advowsons to churches. 1. The writ of right of advowson spoken of before. 2. *Quare impedit*. 3 *Assise of darreine presentment*; which two last are called writs of possession, because they lie only where the plaintiff is not put out of possession, and a bare right only left in him, for where he has nothing but a right, he is put to his writ of right of advowson, *vide Co.* 2 *Inst.* 356, 357. *Fleta*, *Lib.* 5. *c.* 17.

Three ſorts of writs for advowſon at common law.

4. But because there were several defects and mischiefs in the *quare impedit* at common law, therefore the statute of *W.* 2. *c.* 5. 13 *E.* 1. was made. For whereas at common law, if the clerk of an intruder, one that had no right, had got his clerk admitted, that is, instituted, the rightful patron had been put out of possession and was driven to his writ of right of advowson, *Co. Lib.* 6. 49, 50, 51. *Boswell's case*, which was very mischievous to some persons especially, as 1. Purchasers. 2. Infants. 3. Feme coverts. 4. Persons in reversion depending upon estates for life or years, as tenants by the courtesy, tenants in dower. For the purchaser if he never had presented, in case of a usurpation upon him, had lost his advowson for ever, for he could not have a writ of right because he never had presented, but a *quare impedit* he may have by this statute within the six months, and may alledge a presentment in his count in him from whom he purchased; and so at common law (I conceive) he might have done if he had brought his *quare impedit* before the admission of the intruder's clerk. *Sed Quær. de ceo Co.* 2 *Inst.* 356.

Stat. W. 2. c. 5. which gave remedies in quare impedit.

Uſurpations miſchievous to 4 ſorts of perſons at common law. 1. Purchaſers. 2. Infants. 3. Feme Coverts 4. Reverſioners.

In feats, feme coverts, reverfioners, relieved againſt ufurpations.

5. So now by this statute, infants, feme coverts, reversioners, may at the next avoidance after they come of age, after the death of their husbands, and the death of their particular tenants, may have a *quare impedit* or assise of *darreine presentment*, as their ancestors, husbands or lessors might have had in the last vacancy in their own times, and shall not be put to their writ of right.

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Plenarty, no plea if not in ſix months.

5. By this statute none shall be put out of possession of his advowson that brings his *quare impedit* within six months, *(infra tempus semestre)* next after the usurpation, so that now plenarty is no plea as it was at common law; but plenarty for the space of six months is still a good plea, except against the king. *Co.* 2. *Inst.* 360, 361.

Damages recoverable, no coſts.

6. The plaintiff may recover damages by this statute which he could not at common law. *Co.* 2. *Inst.* 362. But the plaintiff cannot recover costs, nor the defendant, because no damages lay at common law for the plaintiff. *Co. ibidem, vide stat.* 23 *H.* 8 *c.* 15. & 4 *Jam. c.* 3. *Quere*, whether the plaintiff shall recover damages in any case but where the bishop has collated or might collate. By the words of the statute it seems not. *Vide Co. Lib.* 6. *Boswell's case, f.* 51.

3 Points to be inquired in a quare impedit.

7. By force of this branch of damages there are three points the jury are to inquire of in a *quare impedit*, or *assise of darreine presentment*. 1. If the church be full and provided for; and if it be, of whose presentation. 2. Of the annual value of the church. 3. If the half year hath passed. *Co. Lib.* 6. *Boswell's case. f.* 51. *Dyer* 194. These points were not inquirable at common law. *Co. ibidem. Bract. lib.* 4. *Tract.* 2 *c.* 6. 7. *f.* 246.

8. A man may have title to the advowson or patronage of a church, chappel, abbey, prebendary &c. many ways, as, 1. By purchase. 2*ly*. Descent. 3*ly*. Grant of the next avoidance. 4*ly*. As executor, if the church become void at the time of the testator, and be void at the time of his death. 5*ly* By lapse, as belonging to the bishop, if the patron do not present within six months after the avoidance, the bishop may collate, and so the metropolitan if the bishop neglect to collate for six months, and then at length the king in default of the metropolitan. How many ways a man may have title to an advowson.

9. The writ is thus:——"The king, &c. to the sheriff greeting: command A that justly, &c, he permit B to present a fit person to the church of N which is vacant, and belongs to his gift as he says. And whereof he complains that the said A unjustly hinders him. And unless he will do it summon by good summoners the said A, that he be before our justices of Chester, at Chester, on the first day of the next session of the county court of Chester, to be held at Chester, to shew wherefore he hath not done it. And have there the summoners and this writ. Witness." *Reg*. 30. Original. (226)

10. This writ may be brought against the disturber only, or against the incumbent and disturber, or against the bishop, disturber and incumbent. But if the bishop be not made a party to the writ, he may present by lapse after the six months past, and if the incumbent be not made a party he cannot be removed by judgment in the *quare impedit*. *Cro*. 2. *pt*. 93. *Lancaster vs. Low*. *Co. lib*. 6. *f*. 5. *Boswell's case*. *Reg*. 31. *Cro*. 2. *pt*. 96. But note, to prevent the bishop presenting, *Br. de quare impedit pendente*, though he be not made party to the writ, the plaintiff may have a writ called a *ne admittas*, in nature of a prohibition, forbidding him Against whom may be brought. Ne admittas.

to collate, pending the cause in the *quare impedit. Reg.* 31. and see there the writ of *ne admittas.*

Summons in Perſon or at Church etc. 15 days.

11. The sheriff must summon the defendant in person, or at the church, 15 days at least before the return. *Br.* 101. *quare impedit.*

Eſſoin. Cheſter.

12. At the return of the writ every defendant may have one essoin, which in Chester is *de die in diem.* In the *common pleas* the days given are *de quindena in quindenam vel de tribus septimanis in tres septimanas, i. e.* 15 days, or 21 days at the most by the statute of *Marl. c.* 12. 52 *H.* 3. which restrained the common days of return in bank, in case of *dower, assise of darreine presentment & quare impedit. Vide Co.* 2. *Inst.* 123, 124.

Proceſs. Summons. Attachment. Diſtreſs.

13. If the defendant appear not, nor essoin in case he be returned summoned, then an attachment shall be awarded, and if he appear not upon the return and be returned attached, then shall be awarded the grand distress, and if he be returned distrained and do not appear, then judgment shall be given against the defendant, and a writ awarded to the bishop, and this by virtue of the said state of *Marl.* for at common law it was only summons, attachment and distress infinite. *Co* 2. *Inst.* 124.

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Proceſs, the ſame after an eſſoin.

14. Note, if the defendant make default after an essoin before appearance, the process is the same as before. *Hast. Entr.* 520. *b.*

Some eſſoin, others make default.

15. If there be several defendants, if one make default, the other may essoin, and process shall go forth against him only that made the default. *Hast. Entr.* 520. *a. b.*

Judgment upon Nihil returned.

16. If the sheriff return *nihil* upon the summons, attachment and distress, judgment shall be entered

for the plaintiff as if the defendant had made default upon summons. *Co* 2. *Inst.* 124.

17. After an appearance upon the *distrangas*, if the defendant take day *prece partium*, and then make default, then an *alias distrangas* shall be awarded, and not a writ to the bishop. *Co. Inst.* 125, *Reg.* 2. *a*, Al. Distringas, when.

18. After the defendant hath appeared, the plaintiff must declare; but because the declaration is various, and many times long according to the nature of the plaintiff's title, I shall not set it down at large in *hæc verba*, but refer to the book of entries, both *Coke* and *Rastall*. Only shall observe some rules of direction to be made use of for the better drawing of the declaration. Declaration, various.

1. In the declaration must be alledged a presentment in the plaintiff or his ancestors, or in some other person, under whom he claims. As the heir may alledge a presentment of his ancestor, a purchaser, a presentment by him from whom he purchased. *F. N. B.* 78. *Eng. Co. Lib.* 5 *f.* 98. 8. *H.* 5. 10. 9. *H.* 7 23. 16 *H.* 7 8. *Dyer* 106. *Co.* 2 *Inst.* 356. Presentment to be alledged in the declaration.

2. If a man build a church parochial, though he never presented, yet he may have a *quare impedit* without alledging any presentment in his count, *præter necessitatem.* 16 *H.* 7. 8 21. *E.* 4. 3. *b.* So if a person come to an advowson by recovery in a writ of right, in his declaration he may alledge a presentment in him against whom he recovered without any other presentment. 39 *H* 6. 25. *b.* 14 *H.* 6. 5. *b.* *Co. Lib.* 5. 97. 16. *H.* 7. 8. Where a presentment needs not be alledged.

3. If tenant for life or years do present, this is sufficient for him in reversion, and he must alledge it in his declaration, and if there be several mesne (228) Presentment of tenant for years, &c. suf-

ficient for the Reverſioner.

presentments by the tenant for life or termor, they must be all alledged in the count or declaration. 16 *H.* 7. 8. 22 *E.* 4 9. 4. *E.* 4. 3. *a.* 7. *E.* 4. 20. *b.* 42 *E.* 3. 4. *a.*

The manner of the voidance muſt be ſhewed.

4. In the declaration, the plaintiff must set forth how the church became void, i. e. by death resignation, or deprivation, because the defendant may traverse the manner of the avoidance, if he claims by another sort of avoidance, as by simony, taking a second benefice, or the like. *Cro.* 2 *part* 6. *St. George Farmer against Nicholson, Cro.* 1 *pt.* 51. *Rast. Entr.* 485, 490, 511.

Judgment by default without a declaration.

5. Note, the plaintiff may have judgment by default of appearance without making any declaration of his title, *Dyer* 241. But I conceive it safer to make a title. *Moore's Rep.* 81. *n.* 214

Attachment & diſtreſs, Judicial writs.

19. The attachment and distress are judicial writs, and are to be sued forth out of the court where the original writ is returned.

The Attachment is as follows:

Attachment.

"The king, &c. to the sheriff greeting: we command you to put by gages and safe pledges T, that he be before our justices, &c. to answer L of a plea that he together with W the bishop, C and M permit him to present a fit person to the church of B which is vacant and belongs to his gift, and to shew why he was not before our justices, &c. on the day, &c. after he was summoned, and have there the names of the pledges, and this writ, &c. Witness, &c." *Rast. Entr.* 520.

This writ may be made returnable on Tuesday, Wednesday, or any other day in the assise week at *Chester.*

The grand distress is thus.

" The king, &c. We command you to distrain T by all his lands and chattels in your bailiwick, so that neither he nor any one for him shall lay their hands upon them until you have another command from us in this behalf. And that you answer to us of the issues thereof. And that you have his body before the justices, &c. to answer W of a plea that he together with W the bishop, &c. And to hear his judgment of many defaults. And have there this writ. Witness, &c." *Reg.* 1. Distringas.

20. In some cases the trial of the issue in this action shall be by the certificate of the bishop, as 1, plenarty for the space of six months, *Rast Entr.* 498. *b. Brief.* 1. 2. 2 Whether the incumbent were instituted at the presentation of such an one? *Rast. Entr.* 533, 534. And so I conceive it ought to be upon an issue of resignation or deprivation. Trial sometimes by certificate of the bishop.

20. The judgment in this action is. That I S recover against L his presentation to the church aforesaid by default (if it is by default) and have a writ to the bishop, the ordinary of that place that notwithstanding the gainsaying of the said L, he admit a fit person to the said church upon the presentation of the said I S, and the same L in mercy &c. *Rast. Entr.* 507. *a.* Judgment.

21. Observe these rules, when a writ to the bishop shall be had and judgment given. Rules where a writ to the bishop.

1. If the demandant makes default at the *grand distress*, the plaintiff shall have a writ to the bishop, *Vide Rast. ibidem. Moore Rep.* 81. *n.* 214. This is by force of the Stat. of *Marl. c.* 12. but then he must make a title by *Moore ibidem.* 10. *H.* 6. 4. *b.* Where the plaintiff shall have a writ to the bishop.

Cessat executio where.

2. If there be several defendants, and one make default, judgment and a writ to the bishop shall be awarded against him, with a *Cess. Executio* till the plea be ended as to the other. *Rast.* 507. *a.* 4. 25 *E.* 3. 34. *b.*

Where plaintiff shall have a writ to enquire of damages.

3. When the plaintiff recovers by default, he must have a writ to inquire of the damages (if he will insist upon it, otherwise he may release them) with a *Cess. bre. Ipo.* till the return of the writ of enquiry, in which writ of enquiry there is a command to inquire of the three points before mentioned, *si Ecclesia sit plena? &c. Rast. Entr.* 507. *b.* 8.

Where defendant may be an actor, and may have a writ to the bishop.

4. In this action both plaintiff and defendant as the case may be, may be actors, and may have a writ to the bishop and a writ to inquire of damages, as 1. If the plaintiff be non-suited, *Rast. Entr.* 508. *a quere* whether the demandant must not make a title first. *Co. Lib.* 7. 27. *b.* 9 *H* 6. 4. *b.* 2 *H.* 5. 6. 11 *H* 6. 8. *Hob. Rep.* 163. 2ndly. If a verdict be given for the defendant. 19 *H.* 6. 31. 18 *E.* 3. 15. 3dly. Upon demurrer to the count, and adjudged for the defendant, the defendant shall have a writ to the bishop, because the title of the defendant appears by the count. *Dyer* 24. *pl.* 153. 4thly. If the writ abate for *Misnomer* of the plaintiff or defendant, insufficiency, false *latin*, the defendant shall have a writ to the bishop. 31 *H.* 6. 15. *Co. Lib* 7. *f.* 27. *Portman's case.* 5thly. If the writ abate by the act of the plaintiff, the defendant shall have a writ to the bishop, as if the plaintiff be made knight after the writ purchased. *Co. ibidem.* 6thly. If the bishop pleads that he claims nothing but as ordinary, &c. the defendant shall have a writ to the bishop with a *cess. Executio, &c.* 17 *E.* 3. 71. 17 *H.* 7. *Keil.* 43.

Note, all this concerning a writ to the bishop for the defendant, is to be understood when the incumbent of the patron defendant is not admitted, for if he be admitted, then the defendant is merely of the defensive part and not an actor. *Vide Vaughan's Rep.* 8. *Hob.* 193. *Wincomb v. Puleston.* Note.

5. If the incumbent be made a party to the writ, he shall be removed by the judgment. *Co. Lib.* 6. *Boswell's case* 51. And so all others presented and instituted pending the writ. And who is instituted and inducted, and by whom, and when, appears by the return of the writ of inquiry. *Rast. Entr.* 508. 9 But such as come in *pendente lite*, and are no parties to the writ, are not to be removed by the judgment, but by a *Scire facias* because he shall not be put out without answer; and therefore *Boswell's case* in this point is denied to be law. See *Cro.* 2. *part Lancaster v. Lowe. Siderfin's Rep.* 14 *Car.* 2. *P.* 94. Incumbent to be removed by the judgment,

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The writ to the bishop,——

"The king &c. to M arch-bishop of York, greeting. Be it known that R knight in our court before our justices at W. recovered his presentation to the church of W. in the county of B which is vacant and belongs to his gift against H knight and L clerk, by our writ of *quare impedit.* And therefore we command you that notwithstanding the gainsaying of the said H & L, although the said R into the said church is admitted instituted and inducted that you remove the same R from the said church and admit a fit person to the said church upon the presentation of the said R and certify to our justices &c. in which manner this our command shall have been executed &c. Witness &c." *Rast. Entr.* 507. *b.* 7. The writ to the bishop.

The writ of inquiry of damages is directed to the sheriff, and is as followeth, *viz.*

The writ of inquiry.

"The king to the sheriff greeting. Know that A in our county before our justices at W. by consideration of the same court hath recovered against B bishop of Winton, C knight, and D chaplain, his presentation to the church of M being vacant and belonging to his gift for this term. Whereupon the same A in our same court brought his writ of quare impedit against them: And because it is unknown whether the said church be full or not, And how much the said church is worth per annum, according to its true value, therefore we command you, that by the oath of 12 good and lawful men of your county, you diligently inquire whether the said church be full or not. And if it be full, then by whose presentation the said church is full—And how much time is elapsed from the time when the said church last became vacant. And how much the said church is worth per annum, according to its true value. And the inquisition which you shall therefore make, certify to our justices at W. &c. under your seal, and the seals of those by whose oaths you shall make that inquisition, and have there the names of those by whose oaths you shall make that inquisition and this writ. Witness, &c." *Rast. Entr.* 507. 8.

Note, this is upon a recovery by default, upon the grant of the next avoidance, but differs not from others, save in these words "for this time belonging."

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No writ of inquiry upon a verdict,

If the plaintiff recover upon a verdict, then there needs no writ of inquiry of damages, for then the jury at the bar shall inquire of the same points, as upon the writ of inquiry. *Vide.* Entry upon a verdict, *Rast. Entr.* 508. 9.

The entry of a judgment upon default at the return of the Grand Distress.

"I, knight, by N his attorney offered himself on the fourth day against B & D in a plea that they permit him to present a fit person to the church of O which is vacant, and belongs to his gift. And they came not: and it was commanded the sheriff that he should distrain them &c. and that of the issues &c. and that he should have their bodies here at this day, to wit.————And the sheriff now returns that he hath distrained them by all their chattels to the value &c. And that they are mainprised by &c. Therefore they are in mercy, &c. And it is considered that the said I do recover against the said B & D his presentation &c. And let him have the writ &c." as before is said, *vide Rast. Entr. 507. judgment. 2. & ibidem. 3. 4.*" Entry of judgment upon default.

Though many books (as I have before observed) say that upon default the plaintiff shall not have a writ to the bishop without making a title, *i. e.* without a count, yet the entries in *Rastall* are without.

The record following I have the rather here inserted, not only because it proves the antiquity of the jurisdiction in the county pallatine of *Chester*, as other records here before more antient, but for that it serves to make out part of the pedigree of the *Booth's* of *Dunham* in *Cheshire*, who are descended in a direct line of heirs males from Sir. *Robert Booth* mentioned in the said record, concerning the advowson of *Winleslow* which now belongs to the *Trafford's*.

Pleas in the county court of Chester, at Chester, before James del Holt, justice of our lord the king, there on Tuesday next after the feast of the conception of the blessed Virgin Mary, in the sixth year of the reign of king Henry, the fifth after the conquest of England. *Roll* 24.

Chester, ss. "Robert de Bothe, in his proper person, offers himself against Godfrey Bosely, clerk in a plea that he, together with John de Legh de Bothes, sheriff of Chester, Ranulph del Hope, one of the coroners of the hundred of Northwick, William del Medles, coroner of the hundred of Wyrchale, Richard de Ridley, coroner of the hundred of Broxon, John Tricket, coroner of the hundred of Edesbury, Ranulph de Sweetentham, coroner of the hundred of Bucklowe, William Brete and Thomas Bruyndely, coroners of the hundred ——— ———and John de Legh del Bache, coroner of the hundred of Macclesfield, permit the said Robert to present a fit person to the church of Wilmeslow which is vacant and belongs to his gift. And he came not, and it was commanded the sheriff that he should distrain him by all his lands, &c. and that of the issues, &c. and that he should have his body at this county court, to wit, on Tuesday next after the feast of the conception of the blessed Virgin Mary, &c. and the sheriff now returns that he is distrained by all his chattels to the value of six pence, and mainprised by John Fox, William Pye, Henry Hus and Thomas Cutt. Therefore he is in mercy, &c. And hereupon the said Robert says that one William Venables Knight was heretofore seised of the manor of Bolyn with the appurtenances, to which the advowson of the said church appertains, and held the said manor of the lord the king in capite, as count of Chester by knight service, and to the same church presented one Thomas Forsh his clerk, who upon his presentation

Distress awarded.

was admitted and instituted in the same time of peace, in the time of the lord Richard, late king of England, the second from the conquest, and afterwards the said William Venables, of the manor aforesaid with the appurtenances, to which, &c. died seised, after whose death the manor aforesaid with the appurtenances, to which, &c. together, &c. descended to certain Alicia and Dulcia as daughters and heirs of the said William Venables, and then being under age, whereby the lord the (234) king, then count of Chester, caused the said manor with the appurtenances, to which, &c. into his hands to be seised on account of the minority of the said Alicia and Dulcia, and afterwards one Johanna, who was the wife of the said William de Venables, sued forth before the justices and treasurer of the lord the king, then count of Chester, in his exchequer there, for the livery of the third part of the said manor with the appurtenances, to which, &c. as her dower by the death of the said William de Venables, her late husband accruing, together with one third part of the presentation to the church aforesaid when it should accrue, to wit, that the said Alicia and Dulcia should have two presentations, and the said Johanna the third presentation, when they should accrue; and afterwards the lord the king, then prince of Wales and count of Chester, by his letters patent dated at Chester the thirtieth day of April, in the fourth year of the reign of the lord Henry, late king of England, the father of the lord the now king, granted to his beloved Oliver de Stanley Knight, the guardianship of two parts of the said manor with the appurtenances, to which, &c. together, &c. by the name of all the lands, tenements, rents, services, fees, reversions and advowsons with the appurtenances which were of the said William de Venables, by the name of William de Venables de Bolyn Knight, to have the same to the said Oliver with all the issues and profits thence

Grant of the wardship.

resulting until the lawful age of the said Alicia and Dulcia, and afterwards the church aforesaid by the death of the said Thomas Forst became vacant, whereby, inasmuch as the said Alicia and Dulcia were then under age, and in the wardship of the said Oliver, the same Oliver presented one Godfrey Bosely his clerk to the same church, who, upon his presentation was admitted and instituted in the same time of peace, in the time of the lord Henry, late king of England, father, &c. and afterwards the same Alicia took to husband one Edmund de Trafford, and the said Dulcia took to husband one Robert, the son of John del Bothe, and afterwards the said Edmund and Alicia, and Robert, the son of John, and Dulcia, at the full age of the said Alicia and Dulcia, sued forth the livery of the said two parts of the manor aforesaid with the appurtenances, together with the fees and advowsons aforesaid, out of the hands of the lord the king; and afterwards the said Edmund and Alicia, and Robert the son of John, and Dulcia, by their certain writing here shown in court, dated on the feast of the nativity of St. John the baptist, in the fifth year of the reign of the lord the now king, demised to one John del Bothe, his heirs and assigns, the said two parts of the manor aforesaid with the appurtenances, together with the advowson of the church aforesaid, for the term of twenty years next ensuing after the date of said writing; and afterwards the said John del Bothe, by his certain writing to the court here shown, dated on Monday next after the feast of the apostles Peter and Paul, in the fifth year of the reign of the lord the now king, demised all the estate which he
(235) had in the said two parts of the manor aforesaid with the appurtenances, together with the advowson of the said church, to the said Robert del Bothe, in the said writ named; and afterwards the said Godfrey Bosely, before Henry de Halsale, archbishop of Chester and commissary, master Walter Bullock,

Vacancy by death.

vicar general of John the bishop of Coventry and Litchfield, was deprived of said church, by reason of which deprivation the said church became vacant, and upon that vacancy to the said Robert del Bothe by virtue of the said demise as above mentioned, it now belongs to the said church to present, and the said Godfrey de Bosely together, &c. the said Robert del Bothe unjustly hinders, &c. Therefore it is considered, that the said Robert del Bothe recover against the said Godfrey de Bosely his presentation to the said church of Wilmeslow, by default of the said Godfrey de Bosely, &c. and let him have a writ to the bishop of Coventry and Litchfield, the diocesan of that place, that notwithstanding the gainsaying of the said Godfrey de Bosely, he admit a fit person upon the presentation of the said Robert del Bothe to that church; and the said Godfrey de Bosely in mercy, &c. and it is affeered by the court at twelve pence. And hereupon the said Robert del Bothe prays a writ to inquire of damages, and it is granted to him, returnable here at the next county court, to wit, on Tuesday next after the feast of St. Hillary next ensuing, &c."

Judgment by default.

By this record most of the former rules I have set down may be observed, and that here the plaintiff makes a title though judgment be given by default.

Pleas in this Action.

1. The pleading in this action is very difficult by reason of the variety and uncertainty of the rules concerning it. And therefore my lord *Hobert* advises plaintiffs in *quare impedit* to name no more defendants than needs must be, and particularly the bishop not to be named, if an incumbent be instituted before the *quare impedit* brought, for then the bishop can do no more hurt to the plaintiff, for he can but constitute pending the *quare impedit*. 2. Not to

Pleadings difficult in this action.

name more disturbers than such as are like to have reasonable titles; for every disturber may make several titles, or confess and avoid the plaintiffs title, and if any pass against him, he is barred. *Hob. Rep* 320.

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Rules of pleading in this action.

Some few rules there are which may be useful. 1. In abatement of the writ, if the patron be not named the writ shall abate, *Hob. Rep.* 316 *Co. Lib.* 7. *f.* 26 *Hall's case*. 2. No such church in the county, is a good plea in abatement. *Co. Lib.* 6. 65, 66. see false *Latin, misnomer:* but the defendant shall not have a writ to the bishop. *Co. Lib.* 7. 27. *b.*

Abatement.

Death of the patron shall not abate the writ. *Co. Lib.* 7. *f* 26. *Hall's* case.

If the writ abate by the plaintiff's own act, as being made knight, &c. the defendant shall have a writ to the bishop. *Co. Lib.* 7. 27. *b.*

Bar. Several Pleas by bishop Patron &c.

Now for pleas in bar, where the writ is brought against bishop, patron and incumbent, they may plead severally, several titles if they please, but ordinarily the bishop pleads, that he claims nothing but as ordinary, &c. to free himself from disturbance and damages being recovered against him; and upon his plea, the plaintiff may demand, and shall have a writ to the bishop with a *cess. executio*, till the plea be decided against the other defendants, *Co. Lib.* 10. 54. 2. the patron may plead any plea to shew his title, or to bar the plaintiff's title. 3. The incumbent at common law could not plead any plea which concerned the right of the patronage, but now by the equity of the statute of 25 *E.* 3 *c.* 7. he may *Co Lib.* 7. 26. *Hall's* case, 4 *H.* 8. *Dyer* 1. *Hob. Rep.* 316. neither could the ordinary at common law plead any plea to the title of the patronage

What pleas incumbent might not plead.

Stat 25 E. 3. 7.

before the said statute, nor now since the statute but in case where he hath already collated by lapse. *Hob. Rep.* 316. 319. 2. The incumbent when he pleads in bar, must always say, that he is parson imparsonee, that it may appear to the court that he is a parson instituted, and so able to plead. *Co. Lib.* 7. *f.* 26. *a.* 3. The incumbent must say of whose presentation he is parson imparsonee, that it may appear to the court that he defends his own title, and his patrons. *Hob. Rep.* 320. And this is traversable, *Hob.* 321.

Parson must say he is parson imparsonee.

Of whose presentation.

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Plenarty, for the space of six months is a good plea in bar to a *quare impedit*, *Co. Lib* 6. *f.* 50. and in such case the patron is put to his writ of right notwithstanding the statute of W. 2.

Plenarty for 6 months, where a good plea.

Note this rule; when the defendant traverseth any part of the plaintiff's count in a *quare impedit*, it ought to be such part as is both inconsistent with the defendant's title, and being found against the plaintiff, doth absolutely destroy his title; and by this rule a man may be guided in that point greatly controverted, when a seisin in gross or appendancy to a manor shall be traversed, and when the presentation. *Vide* 10. *H.* 7. 27 *Anders. rep.* 1. *p.* 296. *Lord Buckhurst's case*, 27. *H.* 8. 29. *Hob.* 301. *Sir Henry Gorndyes case*, *Vaughan Rep.* 8, 9, 10, 11, 12, 13.

Rule in traversing any part of the plaintiff's count.

If a man come to a benefice any other way than by the death, resignation or deprivation of the last incumbent, as by simony and presentation of the king he may traverse the vacancy by death, resignation or deprivation. *Cro. 2. P.* 6. *Rast. Ent.* 485, 490.

Traverse of the manner of the vacancy.

For the writ of *Quo Jure*, *vide antea.*

CHAPTER V.

Quod Permittat.

What.

1. THIS is a writ which lies in many cases, as where a man is disturbed in the enjoyment of his common, whether of pasture, turbary, piscary or reasonable estovers, of a way, nuisance levied, &c. *F. N. B.* 123. *Fr.* It lies chiefly by the heir of the disseisee against the disseisor or his heir, or his alienee who levied the nuisance by the stat. of *W.* 2 *c.* 24*.

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A writ of pleading in this action.

2. This writ is a writ of right in its nature, and as such might come under the title of writs of right before. At common law it lay not for tenant for life, by reason whereof, and that there was great delay therein, the stat. of *W* 2. *c.* 25. was made which gave an assise of *Novel disseisin* for profits apprender as *Estovers*, *Corodies*, *Toll*, *Passage*, *Panage*, *Custodia*, *Parcarum*, *Communia Piscarum*, *Turbarum* &c. which lay not at common law.

Original.

The writ follows, viz. "The king, &c. to the sheriff greeting, Command A that justly, &c. he permit B to have common of pasture in N which belongs to his freehold in the same town or in another town of which the said A or W the father or mother, &c. of the said A whose heir he is, unjustly and without judgment, disseised R the father or &c. of the said B, whose heir he is, after, &c. (now within 60 years)

As a writ of entry.

This writ is in nature of a writ of entry, *Sur disseisin* done to the ancestor. *Reg.* 155, *b.*

As a writ of right.

Sometimes it is merely in the right, and then it is in the *(debet)* thus,—— "The king &c. command, &c. to have &c. common of pasture in C which

* 1 Rev. Laws, 81. Form of the writ in cases of nuisance.

belongs, &c. or otherwise which he ought to have as he says, &c.

And in this writ he shall count as in a writ of right, and join the *Mise* upon the mere right, and battle lies. *Reg.* 156 *a. F. N. B.* 124 *a. Fr.* Count.

There is likewise a *quod permittat* in the *debet* and *solet*, and this is in the possession to be brought of his own possession, and this he counts as in a writ of entry. *Reg.* 156.

Vide the counts for a way, common of pasture, estovers, in *Rast. Ent.* 538, 539, *a.* Counts.

View, but not voucher, lies in a *quod permittat*. *F. N. B.* 297. *Eng.* in the margent. 2 *H.* 4. 13. 45, *E.* 3. 8. *tit. view.* View.

The process is summons, attachment and distress and if *nihil* be returned, a *capias*. *F. N. B.* 124. *b.* Process.

This writ is now out of use, for at this day all actions for ways, commons, nuisances, and the like are turned into actions upon the case, or the right may be tried upon actions of trespass. (239) Out of use.

Note, this writ is *vicontiel*, and may be sued in the county by *justices* as well as in the common plsas. *F. N. B.* 123. *fr.*

For the writ *de medio. vid. f.* 154. and *de consuetudinibus & servitiis. f.* 150. and *secta ad molendinum f.* 156.

Pleas in quod permittat.

He may plead several pleas, according to the nature of the action that is brought.

Mise joined. If it be brought in the *debet* in the nature of a writ of right, whether for a way, common, estovers or the like, the *mise* may be joined upon the mere right.

Traverse of the common. If it be brought in the nature of a writ of entry *sur disseisin*, if it be for common, he may plead the holding of the land in severalty, and traverse the common, or traverse the disseisin. *Rast. Entr.* 599.

Traverse of the prescription If it be in the nature of a writ of entry for common, or a way, &c. he may traverse the prescription for the common or way. *Rast. Entr.* 598. *b.*

CHAPTER VI.

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Warrantia Chartæ.

What. 1. THIS writ lieth where a man is infeoffed by deed with warranty*, and is impleaded in an assise, or writ of entry in nature of an assise, or any other action wherein he cannot vouch, then he shall have this writ against the feoffor or his heir. *F. N. B.* 134. *Fr.*

Who may have it. 2. Tenant for life or in tail rendering rent may have this writ against him in reversion, though they have no deed; therefore "whereof he hath a deed" in the writ is not material; for a reversion and rent reserved maketh a warranty. So other cases there are which make a warranty, for which, *vide F. N. B.* 135. *Fr.*

Lies pendente placito. 3. Note, a man may have a *warrantia chartæ*, though he be impleaded in an action wherein he may vouch; This is to be understood that he may have a *warrantia chartæ pendente placito*, and if he recover his warranty against him and after lose the

* So where he claims by exchange without express warranty in the deed, F. N. B. 123. 4.

land, he shall have an *habere facias ad valenciam* against him that warranted without a *scire facias*. But if the *warrantia chartæ* be brought before, and he has recovered his warranty, then if an action be brought against him for the land, he must vouch if he can vouch, or have a *scire facias* against him that warranted upon the former judgment of recovery of his warranty. But if an action be brought, and the land lost before any *warrantia chartæ* be brought, and he did not vouch the warrantor (if it were an action wherein he might vouch) he shall not have a *warrantia chartæ* afterwards, and so is *F. N. B.* 134, 135. *Fr.* to be understood.* Where the party must vouch.

4. A man may have a *warrantia chartæ quia timet*† before any action brought, though the writ does suppose that he is impleaded, and if he recover his warranty, then if he be afterwards impleaded and lose, he shall recover in value such land as the warrantor had at the time of the *test* of the *warrantia chartæ*; but in voucher a man shall render in value only such land as he had at the time of the voucher. *F. N. B.* 135. *Fr.* 12 *H.* 4. 12. 10 *H.* 7. 13. See the case of sir. *Henry Roll vs. Osborne*, *Hob. Rep.* 21, 22, &c. for the learning in a *warrantia chartæ*. And *Moore's Rep.* 859. some good observations, and the same case, *Leon* 4, *p.* 250. Warrantia chartæ quia timet. Recovery in value from the test of the warrantia chartæ. (241) Where from the time of the voucher.

5. The writ is as followeth :——" The king, &c. command A, that justly, &c. he warrant to B, one messuage with the appurtenances in D, which he holds and claims to hold of him, and whereof he hath his charter (or the charter of H, his father or mother) whose heir he is, as it is said, and unless, &c." *F. N. B.* 134. Original.

* He may have a Warrantia Chartæ also where the vouchee does not appear on the Sequatur sub suo periculo. Co. Lit. 102. a.

† A writ of warranty of charters is either provisional or remedial. The first is in case of fear and provision, the second, in case of loss already suffered, and to be recompensed by value per excambium, Hob. 21.

Count. 6. The count is various according to the particular case of the plaintiff, the warranty sometimes arising upon a deed, sometimes upon a fine made by the defendant or his ancestors to the plaintiff or his ancestors. See for the count, *Kast. Entr. Garranty de chaters*, 396. *b.* 397. *a. b.* 398. *a. b. Co. Entr.* 691, 692.*

Process. 7. The process is summons, attachment and distress *infinite*, and upon a *nihil*, a *capias*, as in a writ of covenant, for this writ is in some respects personal, in nature of a writ of covenant 4 *E.* 2. *Garranty de charters* 29, for he shall recover both in value and damages. If default be made after appearance, a *distringas* peremptory is awarded in nature of a *petit cape*.

8. The judgment in this action is, that the defendant shall warrant the land and likewise damages to the plaintiff, unless it be brought *quia timet*, before any action brought against the plaintiff, for in that case he shall not recover damages, though he must declare *ad damnum* in his count. *Hob. Rep ibidem. Co. Entr.* 692 *a.*

Judgment. This action is brought rarely, though sometimes at this day it may be, for I remember one about twenty or twenty-two years ago before the justices of Chester, between Sr. George Warburton baronet, plaintiff, and John Brerewood esq. defendant, which was confessed as I think. I conceive it was about 15 or 16 *Char* 2. Another there is, the last sessions at Chester assises, *April* 10. *W.* 3.

* It muſt contain the ſpecialty of the warranty and lien. Hob. 21. and concludes ad damnum of the plaintiff. ib.

Pleas in this Action.

The general plea in this action is, *(non dedit. non concessit) Co. Entr.* 692. Non dedit &c.

2. *Note*, the pleading in *Rastall Entr.* 398. *b.* where the defendant pleads that he who made the warranty claimed under him who was but tenant for life, who levied a fine to the disinheriting of him in reversion, and that he in reversion entered for the forfeiture upon the plaintiff, and the plaintiff after entered and disseised him in reversion, and demands judgment, &c. *Quær* the strength of this plea where the point lies to bar him of his *warrantia chartæ*. It seems to me to lie in the change of the estate for the disseisee entering upon the plaintiff before the writ of *warrantiæ chartæ* brought, and the plaintiff re-entering upon him, is a disseisor, and consequently is in of another estate than that to which the warranty was annexed, for by the entry of him in reversion, the estate that was wrongfully had by the fine, was avoided, and consequently the warranty. This may appear by *Hob.* 26. Sr. *Henry Roll's case.* Forfeiture.

CHAPTER VII.

Curia claudenda.

1. This is a writ which lies for him who is tenant for life, or has other estate of freehold in land, and he who has land next adjoining, ought to inclose his land, and will not, to the nuisance of the plaintiff, *F. N. B.* 127. *French.* What.

2. This lies only for him that has a freehold, and not for tenant for years. *F. N. B. ibidem.* and against him whose close is next adjoining to the plaintiff's land.* For whom.

* It lies by the vendee where the vendor sells two closes adjoining to another, not severed, and does not make an inclosure. Mo. 775.

Where to be brought.

3. It may be brought either in the county court by justicies, or in the common pleas. *F. N. B. ibidem Reg.* 155.

Original.

4. The writ followeth, viz.—"The king, &c. command A that just.y, &c. he inclose his land in N which is open, to the nuisance of the freehold of B, &c. which he ought and hath used to inclose, and unless, &c." *F. N. B.* 127. *i.*

Count.

5. The count sets forth how the plaintiff is seised of such land, and the defendant of such *contigue adjacens* to the plaintiff's land, and how he ought to inclose, and by reason of non-closure the cattle of the defendant came into the plaintiff's land. *Vide Rast. Entr.* 141. 142. *Cur. claudenda.*

View, Process.

6. View lies in this writ. *Rast ibidem.* The process is summons, attachment, and distress, and upon default after appearance a *distringas*, in nature of a *petit cape*, and then if he do not appear and save his default, a writ of inquiry of damages shall be awarded. 13 R. 2. *Cur. Claud.* 3. *F. N. B.* 128. *Fr.**

Judgment.

7. The judgment is, that the defendant shall inclose, and the plaintiff shall recover damages, and he shall be distrained *per omnes terras* till he inclose. *F. N. B. ibidem.*

This writ is now much out of use, and turned into an action upon the case to recover damages from time to time.

Pleas in this action.

Non-tenure.

1. *Non-tenure*, may be pleaded to the writ, for

* And a distringas to make reparation. F. N. B. 128. D.

it must be brought against him that is tenant of the freehold. *Rast. Entr.* 142. *a.*

2. In bar (if the inclosure be grounded upon a prescription) the defendant may traverse the prescription. *Rast. ibidem.* Prescription traversed.

CHAPTER VIII. (244)

Partitione facienda.

1. IS a writ to compel those that hold lands in common *insimul* and *pro indiviso*, to divide the lands in severalty by meets and bounds, as coparceners and heirs in *gavelkind* at the common law; tenants in common and joint-tenants of inheritance by the statute of 31 *H.* 8. 1. and of an estate of freehold or for years by the statute of 32 *H.* 8. *c.* 32 *Lit. sect.* 247.* What.

2. It lies by one coparcener against another, or by one against three, or two against two, if there be four, and so against all the others that will not consent by them that do consent. *Lit. sect.* 247. It lies not for tenant by the courtesy. *Reg.* 76. *b.* *Tenet* always implies a tenant of the freehold, and therefore if one of the coparceners make a lease for life, it cannot be brought against him for that land, because in that case they do not hold *insimul et pro indivisio*, and then the writ must be against the tenant of the freehold. 4 *H.* 7. 9 *Co. Lit.* 167. It lies against tenant by the courtesy; but to have it perpetual, he must pray in aid of the heir in reversion. *Reg.* 76. *b.* By whom.

3. The writ is thus,——"The king, &c. If A shall make you secure, &c. summon B, &c. to show wherefore, seeing that the said A and B held to- Original.

* 1 R. L. 542. how joint tenants, tenants in common and coparceners must proceed to make partition.

gether an undivided three acres of land with the appurtenances in I, of the inheritance which was M's, the mother of the aforesaid A and B, whose heirs they are, she the same B opposes making partition thereof between them according to the law and custom of our kingdom of England, and does not permit it to be made, unjustly, as it is said, and have you there the summoners and this writ, Witness, &c." *F. N. B.* 61, *Reg.* 76. *a.*

The like writ of partition by a man and his wife against a third coparcener, where the husband purchased the part of the second coparcener. *Reg. ibidem a. b.*

(245) Count. 4. The count in partition in the several cases, *vide Rast. Entr* 449, 450, 451, between tenants in common and join-tenants per statute, *Vide Co. Ent.* 410, 412. *a. b* 413. *a. b.* between join-tenants for years. *Co. Ent.* 418. *b.* 419. *a.*

Process. 5. The process is summons, attachment and distress *infinite. F. N. B.* 62 *Fr.*

6. Aid lies in this action, which may be counterpleaded, and if it be found against the defendant, it is peremptory, " that partition be made," &c.

Essoin. The tenants may have several essoins, every one one essoin, as in other real actions, though no land be demanded. *Hob. Rep.* 8.

Two judgments in this action. 7. There are two judgments in this action. 1. One that the partition shall be made, viz. " That partition be made between the parties aforesaid, of the tenements aforesaid, with the appurtenances." *Lit. Sec.* 248. *Co. Lit.* 167. 2. The second judgment is, " Therefore it is considered by the court that the said partition remain firm and stable

forever." *Co. Lib.* 11 *f.* 40 *Metcalf's Case. Co. Lit* 169 *a.*

8. Upon the first judgment goes out a judicial writ, as an execution to the sheriff to make partition, which is as followeth, viz. First judgment

" The king, &c. to the sheriff of C greeting. Seeing that A lately in our court, before, &c. was summoned to answer I H of a plea: wherefore seeing that the said A and I H hold together and undivided 20 messuages, &c. *And so recite the writ and first judgment, then proceed.* Therefore we command you that taking with you 12 free and lawful men of the vicinage of C, by whom the truth of the matter may be the better known, you go in your proper person to the tenement aforesaid, with the appurtenances, and there by their oaths in the presence of the parties aforesaid, to be warned by you, if they wish to be present, the said tenement with the appurtenances, by the oaths of the good men aforesaid, having reference to their true value, in two equal parts, cause to be apportioned and divided, and one part of those parts to the said I H, and the other part thereof to the said A, to be held in severalty cause to be delivered and assigned, so that neither the said I H nor A may have more in his part of the said inheritance than he ought to have and to him belongs to have, so that the said I H of the pour party of the said I H, and the said A, of the pour party of the said A, to them of that inheritance accruing may approve themselves. And have that partition distinctly and openly before, &c. under your seal and the seals of those by whose oath you shall make that partition. And have there the names of those by whose oath you shall make that partition, &c. this writ witness, &c." Bre' vic' quod fiat partitio. (246) Inquisition.

Upon the return of this writ, the sheriff returns an inquisition annexed to the writ, of the partition,

which *vide Rast. Entr.* 452. *a b.* And then upon motion to the court second judgment is given. "That partition remain stable, &c."

This writ is commonly brought by consent, and confessed.

Non insimul tenuerant is the general issue in this action.

There is now an act 8 and 9 W. 3, which empowers the court to examine the matter, and enter judgment if the tenant in possession does not appear within 15 days after the return of the attachment, having had 40 days notice before the return. See the statute.

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CHAPTER IX.

What. *A writ of covenant to levy a fine.*

1. THIS writ is in the realty, and lies where a man covenanteth to levy a fine to a man and his heirs of lands or hereditaments, he to whom the grant is made, shall have a writ of covenant. *F. N. B.* 140. *Fr.*

This writ is in ordinary practice, and brought by consent for the assurance of lands.

Original.

The writ is as follows, *viz.*——"The king &c. to the sheriff of C greeting: command A that he keep with B the covenant made between them of the manor, &c. and of N with the appurtenances, &c. or of one messuage &c. in M unless &c."

Note, the same order in the particulars must be observed, as in a *precipe quod reddat. Reg.* 165.

Pre-Fine. 2. Upon this writ when it is taken forth, a fine is paid in the hamper to the king, called the *Pre-*

Fine, (as in other real writs) *Co. 2. Inst.* 511. it is 6s. & 8d. for every five marks of the yearly value of the land. In *Chester* it is paid to the seal-keeper of the *exchequer* at the sealing of the writ, and he indorseth upon the back of the writ what the land is valued at upon a composition, *viz.* "The tenements within written do not exceed 6*l.* per annum, (or more.*)

Poft Fine.

No poft fine in Cheſter.

There is no other king's silver paid in *Cheshire*, for there is no *Post Fine* (which is properly the king's silver) paid there. But there is an old entry of 22d. entered of course upon the king's silver roll, under the entry of every *Præ-Fine* in the roll thus——"From the said B for money called the *king's silver*.——22d. And the entry of the *Præ-Fine* in the roll in the prothonotaries office is thus.——"A gives to the lord the king 6 shillings and 8 pence (or more) for leave to agree with C of one messuage &c. in M whereof he hath the cyrograph.——6s. & 8d."

22d.

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Which is the king's ſilver in Cheſter.

It has been a great question in *Chester* whether of these two last mentioned was accounted the king's silver, for the 22d. called the king's silver, does not answer the proportion of the *Post Fine* (which is the king's silver) which should be as much, and half as much as the *Præ-Fine*. *Co.* 2 *Inst.* 511 And the *Præ-Fine* is entered (as aforesaid) before the justices of *Chester*, as if it were the king's silver, for it is *(pro licentia concordandi.)*

Upon the whole matter I conceive that which is entered as the *Præ-Fine* is the king's silver, and that by the custom of the county palatine of *Ches-*

* All impoſitions heretofore demanded under the names of fines, poſt fines, and king's ſilver aboliſhed. 1 R. L. 70.

ter no other was due to the earl, and the ground of this conception is, because it is entered as the king's silver is at *Westminster*, *scilicet (pro licentia concordandi)* and likewise because it is entered in the court of the great sessions at *Chester* before the justices of *Chester*, upon a roll by the prothonatory as aforesaid, whereas the *Præ-Fine* is never entered in the *common pleas*, but only the *Post Fine*. When, or upon what ground the 22d. came to be entered, I cannot determine, but it may be after the earldom came to the crown for more caution, because the king's silver was a prerogative due to the crown, such a small sum was thought fit to be entered under the other as aforesaid, for the 22d. was not always the sum; for I find 26 *E.* 1. *Ro. Cestr.* 12d. *pro licentio concordandi*, neither is it in any roll in *Chester* before the justices entered, beyond the time of queen *Elizabeth* as I think.

Entring the king's silver in Chester.

It has been an ancient usage in *Chester* when a fine is acknowledged in the vacation between the two sessions, to bring the writ, *precipe* and *concord* into the prothonatary's office to enter the *Præ-Fine* and the 22d. which is entered in a paper book in the office, and this has been taken as an entry of the king's silver, to prevent the avoiding of the fine, in case the party *deforced* shall die before the next assises following.

3. At common law every fine was to be acknowledged in person in open court, but now by the statute of *Carlile*, 15 *E.* 2. in case of sickness, age, &c. other persons may take the fine, and upon this statute is grounded the *dedimus potestatem* to other persons to take the fine. 2 *Inst.* 512.* The

* 1 R. L. 69 The mode of levying fines in this case.

manner of taking a fine both in person before the justices and by commission, is well known by daily practice. *Vide West's presid.* 39. The manner of levying a fine in *Chester*. Dedimus pot teſtatem.

4. There are two sorts of fines. 1. Executed, or 2. Executory. Executed, are either 1. *Sur cognizanzs de droit come ceo que il ad de son done, &c.* which is the highest and most principal fine; or *2ndly. Sur release, confirmation* or *surrender, Co. 2 Inst.* 563. How many sorts.

Executory sur Grant & Render, ibidem.

The fine executed, supposeth the present estate in the cognizee by some precedent feoffment, grant, &c. and the cognizee needs not enter or have an *habere facias possessionem.* 41 *E.* 3. 14. Sur cogniſance de droit, &c.

The executory is when no estate is executed in the cognizee until entry, action or execution by *habere facias seisinam vel possessionem, ibidem. Co. 2 Inst.* 563. And this is the fine *sur grant & render.* And this is done by a fine *sur cognizance de droit tantum,* or other fine executed, and then the cognizee (and at the same instant) grants and renders a rent out of the land or some other estate in the land, &c. to the cognizor. Or where a man grants a remainder or reversion upon a particular estate, there the reversion does pass, but the grantee cannot distrain for rent, or bring an action of waste before attornment. *Lit. Sect.* 579. *Co.* 1 *Inst.* 309. *a.* ¶. *b.* †. Sur grant and render.

And to compel the particular tenant to attorn, the cognizee shall have a judicial writ called a *quid juris clamat. Co.* 1 *Inst.* 320. *a. b.* †. *Leon.* 2. *p.* 40. For the process in a *quid juris clam.* see *pl. com.* 209, 210, 211. *Sanders v. Freeman.* Quid juris Clam.

Per quia servitia. So where a man grants a seignory by fine, and the tenant will not attorn, the grantee may have a *per quia servitia* to compel him. *Co. Inst. ibidem* & 252. a. ¶.

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Quem redditum reddit. And if the rent be granted by fine, and the tertenant will not attorn, the grantee may have a *quem redditum reddit* to compel him.

Quid juris clam, &c. out of use per stat H. 8. de Uses. But now since the statute of *H.* 8. for execution of uses into possession, these writs of *quid juris clamat per quia servitia* and *quem redditum reddit* are out of use where fines are levied to uses; for the statute executing the use to the possession by the *precipe* and *concord* before the ingrossing of the fine, the grantee cannot compel the tenant to attorn, his benefit by a *quid juris clamat* being taken away by the statute; therefore he shall distrain without attornment, for these writs at common law were always to be brought against the tenants before the ingrossing of the fine. *Co. Lib.* 6. 68. Sir, *Moyle Finches* case, *Co.* 1 *Inst.* 309. *b.*

CHAPTER X.

Writ of deceit, Quod ei deforceat, Attaint, forcible entry, re-disseisin and post-disseisin.

THERE are three things especially (that have relation to the giving possession of lands) that are great enemies to justice and the due administration and execution of law. 1. *Fraud.* 2. *Force.* 3. *Vexation.*

Fraud. 1. For *fraud*, is when a man gains possession by some undue means or contrivances in a court of record, *i. e.* procures a judgment for him or a false verdict, and so makes the law a patronage for his injustice. For remedy in this case, the law has provided the writ of deceit, and *quod ei defor-*

ceat against a judgment fraudulently had and the writ of *attaint* againt a false verdict.

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2. For *force*, it is likewise odious in law, and is when a man will not wait an orderly course of law for the gaining of his possession, but will be his own carver, both judge and party in his own cause, and therefore takes possesion by force and strength of arms. Against these, several statutes have been made, 5 *R* 2. 7. 15 *R*. 2. 2. 8 *H*. 6. 9. 13 *Eliz* 11. 21 *Jac*. 15. Force.

3. *Vexation*, which is a great contempt of the law, when a man will not rest satisfied with the judgment the law has given, but after judgment and execution will make new entries and disseisins upon the recoverer, against which are provided the writs of re-disseisin and post-disseisin. Of these I shall observe something in their order, and so conclude this tract of real actions. Vexation.

Sect. 1. *Writ of deceit.*

1. When any thing is done deceitfully and fraudulently to the damage of another in some court of record, as purchasing a writ in my name I knowing nothing of it, confessing an action, an attorney making default fraudulently in a real action, whereby I lose my land or other thing, in those and several other cases, the writ of deceit lies. *F. N. B.* 95, 96. *&c. fr.* What.

2. But I shall only speak of this writ as it has relation to real actions, where the possession of lands or hereditaments is unjustly or irregularly gained. and in that respect it lies where an attorney by covin makes default in a real action, whereby the land is lost. *Vd. Reg.* 113. *Fitz. N B.* says the writ of deceit lies against the attorney. Where it lies.

But *quaer.* whether it does not lie against the attorney and the demandant, and that the tenant shall be restored to the land; and I conceive it does.

Where it lies.

3. It lies in a *precipe quod reddat*, where the sheriff returns the tenant summoned, whereas he was not summoned by which the tenant loses the land at the return of the *grand cape*. *F. N. B.* 232. *Eng.* And this writ is to be brought against the sheriff and him who recovered, and the tenant shall be restored to the land, *ibidem.*

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Out of what Court.

4. It may be sued either out of the *common pleas*, or out of the *chancery*, so it is either judicial or original, at the election of the party. 22 *E.* 3. *Deceit.* 6. *F. N. B.* 99. *Fr.*

Proceſs.

5. In this case of losing by default, the writ of *deceit* is in nature of an *audita querela*, and begins, *questus est nobis, &c.* And the process against the

Venire facias.

sheriff, *summoners*, *veiors*, and him that recovered, is a *venire facias*, in nature of a summons contained in the same writ, *Rast. Entr.* 222. *a. b.* But in other writs of deceit, the process is attachment and distress, &c. *F. N. B.* 100.

When the action fails. Summoners and Veiors.

6. If the summoners in the *precipe quod reddat*, and the summoners and veiors in the *grand cape* be dead, this action fails. *F. N. B.* 99. *Fr.* If one summoner and veior be alive it is sufficient. 8 *H.* 6. 1. 18 *E.* 4. 1. *F. N. B.* 234. *Eng.* For the trial must be by examination upon oath of the summonors and veiors. *F. N. B.* 99. *Fr.* 232. *Eng.*

7. For the process, the appearance of the summoners, sheriff, &c. and manner of the examination, *Vide Rast. Entr.* 222. *b.* 223. *a. b.*

8. By the original writ the sheriff is commanded to return an inquisition by the oaths of twelve men of the yearly value of the land recovered, and when judgment is given for the plaintiff in the deceit, he shall recover the yearly value from the time of the first judgment, together with the seisin of the land. *Rast. Entr.* 222. *b.* Inquisition in the original writ.

9. In a *scire facias* where a man loses land by default, the like remedy by writ of deceit, as in case of non-summons in other pleas of land by the statute of 2 *E.* 3. 17. Scire facias.

10. So if a man for want of summons loses by default in a *quare impedit.* 26 *H.* 6. *droit.* 15. 34 *E.* 1. *droit.* 57. *Leon.* 1. *p.* 294. Quare impedit.

11. This action in case of losing by default is now worn out of use, especially since the statute of 31 *Eliz. c.* 3. which orders sheriffs in real actions after summons to make proclamation of the summons upon Sunday following, &c. and all actions of deceit are now generally turned into actions upon the case. Yet the case may be so now, as this action may of necessity be sometimes useful at this day; as in a *formedon* or writ of dower, if the attorney of the tenant of purpose make default when the tenant was duly summoned, what other remedy has the tenant but this writ? or a *quod ei deforceat?* or a writ of right? Stat. 31 Eliz. c. 3. Of the manner of sommons. Much out of use.

Sect. 2. *Quod ei deforceat.*

1. This writ lies for a particular tenant of the freehold, as tenant for life, tenant in dower, by the courtesy, and tenant in tail where they lose their land in a real action by default, whether they were duly summoned or not. And this writ is given by the statute of *W.* 2. *c.* 4. for at common law such Where it lies.

tenants and the tenant in tail after the statute *de donis conditionalibus* were without remedy if they lost by default, and were duly summoned, for they could not have a writ of right, which none but tenants in fee-simple could have. *Co.* 2 *Inst.* 350. *Co.* 1 *Inst.* 481. 674, 675.

Deceit or quod ei deforceat.

2. If the tenant be not duly summoned, he may have his writ of deceit or this writ of *quod ei deforceat* at his election. *F. N. B.* 381. *Eng.*

Lies not upon nihil dicit.

3. This writ lies not upon a default of *nihil dicit*, after appearance. *Vide le reason Anders.* 1. *p.* 271. *Elmer's case. Cro.* 3 *p.* 263. *Owen's Rep.* 101.

Againſt the heirs

4. It lies against the heir or alienee of him who recovered as well as against the recoveror himself. *Lit. sect.* 674, 675. *Co.* 2 *Inst.* 352.

Formedon.

5. It lies not for the heir of tenant in tail, but he must bring his *formedon*. *F. N. B.* 382. *Eng.*

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Original.

The writ is thus, viz.—"The king to the sheriff, &c. command A that, &c. he render to B who was the wife of C, one messuage with the appurtenances in N which she claims to be her reasonable dower; *or thus*, which she claims, &c. and whereof the said A unjustly deforcethher, as she says, &c." *F. N. B.* 155 *c. Reg* 171.

Original.

For tenant in tail the writ is as followeth, viz — "That he render, &c which he claims to hold to him and his heirs of his body issuing, and whereof the aforesaid A unjustly deforceth him. *Ibid.*

So for the tenant by the courtesy, and for life, *vide ibid. b.*

6. This writ is of the nature of the first writ, so that the demandant in this writ being tenant in the former, may vouch as tenant to the former action; And the tenant in this action is as it were actor or demandant; for he pleads the former recovery and sets forth his title, and says, he is ready to maintain his right and title aforesaid, &c. and then the former action is revived, and the demandant may vouch, as is said before, if voucher lay in the former action. *Co.* 2 *Inst.* 351. 2 *E.* 4. 11. *Co.* 2 *Inst.* 352. Defendant actor. Demandant may vouch.

Note, the demandant in this action can vouch none but him in reversion. *Co.* 2 *Inst.* 352. Voucher.

And both demandant and tenant may vouch. *Co. ibid.* 10 *H.* 7. 10*. Demandant & tenant may vouch.

There can be but one voucher in this action, and therefore the vouchee shall not vouch over. 10 *H.* 7. 29. 9 *E.* 3. 22. *Co. ibid.*

7. The count is thus,——

"W of H demands against B one messuage, &c. in L which he claims to hold for the term of his life, and says that the said B unjustly deforceth him, &c. whereupon he saith that he was seised of the said tenement with the appurtenances in his demesne as of free-hold in time of peace, in the time, &c. by taking thereof the explees to the value, &c. and into which, &c. and thereof he brings suit, &c." *Rast. Entr.* 537. *a. b.* Count.

Note, this count the demandant counts that he was seised of the land for life, without shewing of whose lease, &c. because the action is brought of (255)

* 1 R. L. 85.

his own possession, and this puts the tenant in this writ either to plead the former recovery, and his title or some other matter in bar, for he may do either. *Co.* 2 *Inst.* 351. 10 *E.* 4. 2. 29 *E.* 3. 47.

Vide the recovery pleaded, and issue upon the title. *Rast. Ent.* 537. *b.* 1. 2.

Process. 8. The process in this action is, *summons*, *grand cape*, and *petit cape*, as in other *precipe quod reddats*.

9. The judgment is as in all other real *precipe quod reddats*.

Sect. 3. *Attaint.**

What. 1 *Attaint* is a writ or action where a false verdict is given in a plea, real or personal, by writ or bill, then he against whom this verdict is given may have this writ. *F. N. B.* 252. *Eng.*

2. In this action, the jury appears the first day, as in *assise* or *juris utrum*. *Vide Rast. Entr.* 86. *a.* 88. *a.* 4.

Quotuplex. 3. This writ is either judicial or original, *i. e.* it may be sued out of the *common pleas*, or *king's bench* upon a false verdict given in the same courts, or out of the *chancery*. *F. N. B.* 257.

Against whom. 4. It must be brought against him that was tenant or defendant in the former action; if it be in a real action, he must continue tenant at the time of the attaint brought, or it may abate. 6 *assise* 6.

* Attaints upon untrue verdicts abolished. 1 R. L. 358.

5. The jurors likewise of the first inquest must be attached to appear the first day with the former defendant, and all this appears by the writ.

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For the writ and return both of the jurors upon the writ of attaint, and of the first inquest, *Vide Rast. Entr.* 86. 2.

Proceſs at common law.

6. The proceſs against the defendant at common law was resummons, if he appear not the first day, and upon the return of the resummons the jury shall be taken by default. *Rast. Entr.* 86. *b.* Now it is *summons, resummons,* and *distress infinite per Stat.* 23 *H.* 8. *c.* 3.

Per Stat. 23 H. 8. c. 3.

Diſtringas va. the firſt jury.

7. The process against the first jury is a *distringas* if they do not appear the first day, then at the return of the *distringas*, the jury shall be taken against them by default. *Rast. Entr.* 86 *b.* Now *summons*, and *resummons* and *distress infinite per Stat.* 23 *H.* 8. *c.* 3. And if upon the distress nether defendant nor petit jury do appear, yet the grand jury shall be taken *per Stat.* of *H.* 8. aforesaid.

Demand of oyer.

8. Upon the appearance the defendant or tenant and the former jury may demand *oyer* of the writ of *attaint*, and the record upon which it is grounded, and if there be any variance, it may be pleaded in abatement. 7 *Ass.* 5 *Rast. Entr.* 88. *b.* 5. & 89. *a. b.* And then upon demand the plaintiff may shew the false oath. *Rast. ibidem.*

Eſſoin.

9. The tenant may essoin the first day, but not after appearance no more than in an assise of *Mort-dancester* or *juris utrum. Vide supr.* 7 *Ass.* 8 *W.* 1. 42. No essoin *per Stat.* 23 *H.* 8. *c.* 3.

Entry of the action.

10. The entry begins thus,—"24 Jurors, knights of the vicinage of E come to recognize, if the jurors by whom a certain inquisition in court &c between &c. have made a false oath &c." *Reg. Entr.* 89. *a. b.*

Judgment in attaint.

11. The judgment in *attaint* at common law was dreadful, that the plaintiff should be restored to all that he had lost; that the petit jury *i. e.* the jury which gave the false verdict should be imprisoned, their lands taken into the king's hands, and wasted and destroyed, their wives and children turned out of their possessions, and all their goods forfeited to the king, and themselves to be as outlaws. 6 *Ass.* 7 *Hast. Entr.* 92. *b. Judgment* 1 *Co.* 2 *Inst.* 130*.

Judgment altered by the Stat. 23 H. 8.

12. But now the rigor of this judgment is altered, and several other proceedings in *attaint* by the statute of 23 *H.* 8. *c.* 3. which is now the rule for *Attaints*. *Vide Dyer* 201. *a. b.* 3 *Eliz. Co.* 1 *Inst* 294 *b. Leon.* 1. *p.* 279.

In what court.

13 By force of this statute an *attaint* now can be brought in no court but in the *common pleas* or *king's bench*.

Out of use.

Time hath worn out the use of this action, and therefore I shall not proceed in it any further. Though I conceive it may be very useful still where juries give excessive damages. 12 *E.* 4. 5. *Vide Co.* 1 *Inst.* 355. *b.* In what actions it lieth not. *Vide Co. Lib.* 11. *Priddle* and *Napper's* case. In what cases an *attaint* lieth.

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* Quod amittant liberam legem, forisfaciant bona et catalla, quod terræ et tenementa in manus regis capiantur, prata arentur et corpora sua carceri mancipentur, Co. Lit. 294 b.

Sect. 4. Forcible Entry.

The former actions relate to fraud and deceit, and to remedy in such cases, or where the party is surprised, and judgment obtained against him by default, or by false verdict. These now that follow relate to force, against which the law has provided suitable remedies.

I shall not say any thing as to indictments, for forcible entries and detainers, being not so proper to the nature of the present subject, but only set down something concerning actions the party may have in case of such unlawful entries.

Difference between an action and force, indicted.

2. But this is to be noted for a difference between an indictment and an action for the force, as to the remedy of the party. If the entry be lawful, i. e. if the party that entered have good title to the possession, there no action can be brought upon the statutes, but the party may be indicted for the force, and he who is ousted (after such indictment found) may be restored to his possession. So that in such case an indictment now upon the statute of *H.* 6. is better than an action. 15. *H.* 7. 17. *Br. Forces* 11.

Stat. against forcible entry.

3. The statutes against forcible entries whether the party have right or not, are the 5 *R* 2 *c.* 7. 15 *R* 2. *c.* 2 & 8 *H.* 6. *c.* 9*.

4. The action of trespass upon the statute of 5 *R.* 2. and 8 *H* 6. we shall speak to. And first the declaration which shews the nature of the action next followeth.

Declaration.

Norfolk, ss. " A was attached to answer as well to the lord the king as to W of a plea, wherefore

* 8 Rep. Anno, 1614.

seeing by a statute made in the parliament of the lord Richard, king of England, &c. the second after the conquest, held at Westminster in the 5th year of his reign, it was ordained among other things, that no one should make entry into any lands or tenements, but in cases where entry is given by law, and in such case not with strong hand nor multitude of people, but only in peaceable and easy manner. And if any person do to the contrary and thereof be duly convicted, he shall be punished by imprisonment of his body, and shall be fined at the discretion of the king as in the said statute is more fully contained. The said A in one messuage, &c. of the said W in B, into which entry was not given to the said A by law there made an entry in contempt of the now *lord the* king, and to the great damage of the said W and against the form of the said statute. And whereupon the said W who prosecutes as well for the lord the king, as for himself, by I L his attorney, complains that the said A on the 4th day of May in the year, &c. into one messuage, &c. of the said W in B into which entry was not given to the said W by law, &c. there made an entry in contempt of the now lord the king, to the great damage of the said W and against the form of the said statute. Whereupon he says that he is injured and hath damage to the value, &c." And thereof he brings suit. *Rast. Entr.* 534.

The declaration upon the statute of 8. *H.* 6 is in the same form *mutatis mutandis* reciting the statute.

No action given per stat. 5. R. 2. but implied.

5. Note, no action is given to the party in express terms by the statute 5. *R.* 2. yet actions are very frequent in the old books: but I conceive the reason is upon a general rule in law, that where a statute forbids a thing generally there he that is damnified by doing it, may have an action upon the statute. *Co. Lib.* 10. 75. *b.* As the action of *scandalum mag-*

natum is grounded upon the statute of 2 *R.* 2. *c.* 5. though no action is given thereby expressly to the party *Modern Rep.* 233. Scandalum magnatum not given per 2. Richard 2. but implied.

6. But by the statute of 8 *H.* 6. an action is given expressly, and treble damages; and both costs and damages shall be trebled, *Vid. Leon.* 1. *p.* 282. & 2 *p.* 52 * Action given per stat. 8 H. 6 & treble damages.

7. The general issue (*non expulit & disseisivit*) may be pleaded in these actions where the party entered peaceably *Rast. Entr.* 351. Or a special plea in bar, as in an action of trespass, and must conclude with a traverse "Without this that the said A expelled the said B with a strong hand, &c." *Rast. Entr.* 352. *b.* 4. which traverse is not to be answered by the plaintiff, but the special matter only, which if it be found against the defendant, the force shall be implied, and not inquired of by the jury; and if it be found for him, the force shall not be inquired into, but the defendant shall go quit, because his entry was lawful. *F. N. B.* 618 *Eng.* 15 *H.* 7. 17. 21 *H.* 6. 39. 9 *H.* 6. *Entr.* 15. 9 *H.* 6. 13. But the force shall be inquired upon the general issue. 15 *H.* 7. 17. Where the force shall not be inquired after.

8. He that hath been in possession three years peaceably may hold with force, and is not punishable by the statute of *H.* 6. or any other statute. *Vid. the proviso in the statute.*† Poſſeſſion for 3 years.

9. None can have this action upon the statute of *H.* 6. but he that is seised of an estate of freehold. *F. N. B.* 617 *Eng.* for none can be disseised but a Muſt have a freehold.

* 1. R. L. 104 gives the party aggrieved an aſſiſe of novel diſſeiſin, or a writ of treſpaſs againſt the offenders and in a caſe of recovery treble damages with coſts.

† 1 R. L. 103.

tenant of the freehold. But the action upon the statute of 5 *R.* 2 a tenant for years may have.*

Process. 10. The process is the same as in an action of trespass.

11. Note, in an action upon the statute of *R.* 2. a man cannot plead his freehold generally, without making a title, as he may in an action of trespass; so note the difference. *Kel. Rep.* 46. 11 *H.* 7. 15. 27 *H.* 8. 26. *F. N. B.* 249. *D*

(260) *Sect.* 5. *Redisseisin and Post-disseisin.*

What. 1. This writ of *redisseisin* and *post-disseisin* is in nature of a commission to the sheriff and coroners to hold plea in such cases, and the entry is "pleas at C before H sheriff of S associating with him T and D coroners, &c. in the said county on such a day, &c. in the year, &c." *Vid. Bulstr. Rep.* 2. *p.* 93.†

Given per stat. of Merton. 2. The writ of *Redisseisin* is given by the statute of *Merton*, *c.* 3. 20 *H.* 3. and lies when after a man has recovered in an assise, land, rent or common, &c. and has execution, and then the former disseisor does again disseise him that recovered; then he who is disseised, shall have this writ directed to the sheriff, commanding him that taking with him the coroners of the county, they go to the place, and there by the first jurors and others, they take an inquisition; and if they find the redisseisin, to commit the re-disseisor to the goal till he be delivered by ransom, &c.‡

Where it lies.

Vide Cro. 2. p. 335 40 Aff. 30. F. N. B. 189. b.

* 1 R. L. 104 declares that the provisions of the act shall extend as well to tenants for years and guardians, as to such as have estates of freehold.

† 1 R. L. 87. ‡ ibid. 88.

3. And the same statute of *Merton* gives the writ of *post-disseisin* after a recovery in any real action by verdict*. Poſt-diſſeiſin per Merton.

4. But the statute of *W.* 2 *c.* 26 gives double damages in a redisseisin, besides the fine and imprisonment, and the writ of *post-disseisin* after a recovery in any real action by default or reddition, or any other way, *Co.* 2 *Inst* 416.† Stat W 2, c. 26. gives double damages.

5, The difference between a *redisseisin* and *post-disseisin* is this, that the *redisseisin* is against him who was found disseisor before, but the *post-disseisin* is against him that was tenant in the former writ, in what real action soever. *Co.* 2 *Inst.* 417. *Vide Rast. Entr.* 548. *b* The writ and judgment in a *redisseisin* and *post-disseisin.* Difference between redisſeiſin and poſt diſſeiſin.

6. When the sheriff has received the writ that he has to warn the *redisseisor*, and who is complained against by the writ to appear at the taking of the inquisition if he thinks fit, if he does not appear, the inquest shall be taken by default, if he do appear, he may plead in abatement of the writ, join-tenancy or the like, or in bar, as a release, 33. *E* 3. *Redis* 7. 40 *Ass.* 23. *Co.* 2 *Inst.* 83. If he do appear and say nothing to the contrary by pleading, the inquest shall be taken. *Rast. Entr.* 549. *a.*‡ What the ſheriff is to do. He may plead though the words of the Stat. do not warrant it. vid Kelw. 225. b. (261)

7. If the inquest find the *redisseisin* or *post disseisin*, the judgment is entered before the sheriff thus, Judgment.

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* 1 R. L. 88. † 1 R. L. 87.

‡ The sheriff muſt be preſent with 2 coroners if there are so many otherwise one will do. 2 Inſt. 84, and therefore if he return that he took one coroner only, the other being ſick, it is error. 2 Bulſt. 93

The inqueſt ſhall be taken by 2 at leaſt of the former jury with others, if the former recovery was by verdict 2 Inſt. 84. and if all are dead or only one ſurvives the rediſſeiſin fails. 2 Inſt. 84 2 Cro. 335 If however the former recovery was upon demurrer, the inqueſt ſhall only be by others de vicineto, 2 Inſt. 84,

viz.—"Therefore it is considered that the said I recover his seisin against the said A of the said messuage &c. with the appurtenances and his double damages by reason of the redisseisin according to the form of the statute in such case provided which said double damages amount to 200*l.* And thereupon let the said A be taken and imprisoned in safe custody of the lord the king, so that he may in no manner be discharged from the said imprisonment without the special command *of the* lord the king, &c."

Note, the jury gives the single damages, and the court by the judgment doubles it. *Co.* 2 *Inst.* 416.

He is not to be discharged upon bail or otherwise without the king's writ, upon payment of a fine by the statute of *Marl. c.* 8. *Vide Co.* 2 *Inst.* 114, 115. And this is the meaning of the judgment.

SUPPLEMENT

TO AN

ASSISE

OF

NOVEL DISSEISIN.

WHAT follows concerning an assise was brought to my hands by the kindness of a friend, and in regard it is very full and may be useful upon occasion, I have here added it as a further inlargement to the chapter of assise herein before mentioned, and for further explication of the nature of an assise and its process.

1. An assise, what it is, *Lit.* 5. 234. 1 *Inst* 103. *Mirror*, *c.* 2 15. *Bract. Lib.* 4. *c.* 4. *Fleta*, *Lib.* 4. *c.* 5. *Britton. c.* 2. 44, 45. What.

In an assise the plaintiff shall recover his land, damages and costs of suit.

It is called *festinum remedium.* 1. Because the tenant shall not be essoined. 2ndly. Shall not cast a protection. 3dly. Shall not pray in aid of the king. 4thly. Shall not vouch any stranger, except he be present and will enter presently into the warranty; so of receit. 5thly. The parol shall not Festinum remedium.

demur for the non-age of the plaintiff or defendant. 6thly. It is most beneficial; for in no action at common law a man shall recover damages, but in an assise. *Stat. Glocester c.* 1. *Co.* 2 *Inst. Co. Lib.* 8. 50.

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For whom it lies.

It lies for him who is seised in fee-simple, tail, for life, tenant by *elegit per statute* 13 *E.* 1 *c.* 18. by statute merchant, *per stat.* 13 *E.* 1. *de mercatoribus;* by statute staple, *per statute* 23 *H.* 8. *c.* 6. By a reversioner upon ousting his termor. By the lord upon ousting of his copy-holder, by a joint-tenant upon the ousting of his companion. By a parson of a church, of a common of pasture *per statute* 13 *E.* 1. *c.* 20. *Co Lib.* 8 84. By tenant by recognizance in nature of a statute staple, *per statute* 23 *H.* 8. *c.* 6.

Against whom. Kell. 20 28 Aff 37, 46 Aff. 10.

It lies against the tenant of the freehold and the disseisor who ought to be named in the writ, otherwise it shall abate, and so if it be of a rent, the tenant of the land shall be named, and so of an office, to be exercised in lands, houses, &c. *Fitz Ass.* 449 4 *E.* 3 but it is sufficient if one tenant and one disseisor be named, 28 *Ass.* 37. 46 *Ass.* 10. But in an assise of rent charge or rent seck, all the tenants of the land ought to be named, *Co. Lib.* 6. 58. b. 32 *Ass.* 10. 31 *Ass* 31. But in an assise of rent against the *mesne*, the ter-tenant need not be named, 31 *Ass.* 31. And although the tenant alien, hanging the writ, yet it is maintainable against him as tenant, 9 *Ass.* 15. 12 *Ass.* 41. or if the disseisor be ousted. But in an assise of tithes, the ter-tenant need not be named, and it lies against the pernor where the tenant hath aliened, and he who makes the disseisin may be adjudged tenant. 24 *E.* 3. 31. and 63. But lies not against the pernor except it be brought within the year after the title accrued, or the disseisor himself, against whom the assise

Dyer 84 a. 22 H. 6. 16. 1 H. 4. 4. 9 H. 6. 21. 12 H. 4. 2. Co. Lib. 1 123 Co. Inst. 445. Raft. Entr. Aff 2 Ric. 2. c. 3. 22 H. 6. 5.

lies during life if pernor the day of the writ purchased. 4 *H.* 4. *c.* 7. 4 *H.* 7. 24.

It lies of any thing, a *praecipe quod reddat* may be brought at common law, as of common. 2 *H.* 4. 11. Of an hospital, chappel by the name of a messuage, 13 *Ass* 2 But by statute of 32 *H.* 8. *c.* 7. it lies of a patronage, vicarage, tithes, &c. and by statute *W.* 2. *c.* 25. it lies of profits *apprender* in a certain place* as of *estovers, de nucibus, glandibus and aliis fructibus colligendis et capiendis in alieno solo, de corrodio, tolneto, mercatu, feria, tronagio,* (264) *passagio et aliis officiis et ballivis in feodo** *ou per vie,* and it lay at common law of an office, although removeable. 7 *E.* 3. 63. 8 *E.* 3. 55, 56. 10 *E.* 3. 27. *b. Fitz. View* 77. 27 *H.* 8 12. 7 *H.* 6 8. 7 *Ass.* 12. 10 *Ass.* 11. although removeable, 2 *E.* 4. 2. It lies of turbary, piscary and other commons whether appendant or in gross, which lay not at common law, because no writ in the register, 8 *Co.* 48. Of an office of packing wool, 21 *H.* 6. 10. Of clerk of the crown, 9 *E.* 4. 6. Of serjeanty of the bank, of the keeper of the forrest, of the bailiwick of the forrest, of the of the *exchequer, Eitz. Ass.* 7. 7 *Ass.* 12. Of a boiling of salt in a certain place in other lands, 9 *Ass.* 12. Of the office of register of the court of admiralty, *Dyer* 103. Of precedency of a college, *Dyer* 203. Of the mastership of an hospital and a lay fee, 11 *Co.* 99. *b.* Of the office of filazer, *Dyer* 114. *b.** Of the office of herald. But it lies not of an office without profit. And if the plaintiff be disseised of the profit of his office or any part thereof, he may have his assise thereof and not of the office itself, 21 *H.* 6. 10. and it may be of part of an office, as the fourth part of the office of serjeanty of the bank, 7 *Ass.* 12. *Fitz. Ass* 7. So of a corody, 22 *H.* 6. 9. 12 *Ass.* 23.* It lies against the lord for distraining his tenant so often that he cannot manure his land, *F. N. B.* 78.

Of what. Raft Entr. Aff Common' Brownlowe's, Entr 55. 1. p. 65, 66.

* Fitz. Aff. 445. F N. B. 227.

* 30 Aff. 4 22 H 6. 9. 9 E 4 6. Dyer 7 Eliz. 114. 153.

Fitz. grant 104 Bract. Lib. 4. c. 2. 231. Fitz. Ass 417, 138.

* Brownlow. 68.

* Raft. Entr. as in fovent diſtreſs.

or 178. 9 *H.* 7. 3. 27 *Ass.* 51. but it lies not against a stranger because the tenant may make rescous, 27 *Ass.* 51. It lies not for distraining for homage, fealty, or suit, 27 *Ass.* 50. and it lies though the plaintiff continue possession, 21 *Ass.* 51. 28 *As.* 50. *Contr. Kell* 20 So *per stat. W.* 2. *c.* 25 * It lies where any depasture in my several pasture, *F. N. B.* 178. 27 *Ass.* 30. 8 *Co.* 45, and for fishing in my several piscary, *F. N. B.* 178. 27 *ass.* 30. *Fitz. as.* 438. Of the *vesture* or *prima tonsura prati*, *Dyer* 71. Of tithes or a certain portion of tithes, *Dyer* 83. and many things may be joined together in an assise, as common of estovers and turbary, or of land and a corody, or of a rent service and a rent charge or seck, 7 *Ass.* 18. 11 *Ass.* 22. Of the office of a constableship of a castle, keeper of a park and goal and forrestership, *Rast Entr. assise* in office.

* Rast. Entr. Ass. in com. a.

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Of what it lies not.

It lies not of a rent out of land in several counties. 10 *Ass.* 4. 18 *Ass.* 1. Nor of rent out of rent. 3 *H.* 6. 20. Nor of an annuity or pension. 14 *H.* 6. 12. Nor of an hospital or chappel but by the name of a messuage. 23 *Ass.* 2. nor of a passage over the water, nor of a way. *Fitz. Ass.* 440. Nor of the profit of a fair *Br. Ass.* 471. *Fitz. Ass.* 388, 417 Nor for not doing service. *Kell* 130 Nor of offices without profit, nor of any easement. 30 *Ass.* 4. 8 *E.* 4, 22. 17 *H.* 8. 12.

Where it shall be brought.

It shall be brought in the county where the land lies; but where a manor extends into several counties, or if it is of common in one county appendant to land in another and the counties are next adjoining, the writ shall be brought in *confiniis comitatus:* See of offices to be executed in two counties, it needs not in such cases that the counties be adjacent. 21 *H.* 6. 9, 10. 10 *E.* 3. 18. *Kell.* 98. *a.* 7. *Co.* 3. But by the common law one cannot have an assise in *confiniis comitatus* of

a rent issuing out of land in two counties; but now by the statute 7 *R.* 2. *c.* 10. one may although ten counties intervene, and there shall be several originals and one patent, 5 *E.* 4. 2. *F. N B.* 100. If rent be granted out of land in one county and distress granted in another, it shall be brought where the rent is issuing, and not where the distress is to be taken. 10 *Ass.* 4. 3 *Ass.* 7.

In what court and before whom.

It may be brought in the one bench or in the other, if the land lies in the county where they sit, at the election of the party. *F. N. B.* 177. *b.* 437. 9 *Ass.* 7. 10 *Ass.* 17. But if one bench be there only, then in that, *Reg.* 196. but if neither the one nor the other, then before the justices in *Eire* without a commission, *Reg.* 197. *a. Br. Ass.* 496. or before the justices of assise of the same county by their general commission, but then the original ought to bear date before the patent; or before some other by special commission, to whom some others may be associated, but then there ought to be writ of *Si non omnes*, otherwise they all ought to be present, and one may be associated in the place of the principal judges of assise. 28 *Ass.* 2. But if the plaintiff be made one of the justices, the assise cannot proceed. 45 *Ass.* 3. If the king make several writs of association, the last is void, but if all be made at one and the same time, that which the justices accept first shall be only good. 22 *H.* 6. 10. And if the parol be put without day *per non venue* of the justices, yet the patent of *Si non omnes* shall stand for the whole plea. 14 *Ass.* 15. and if there be new justices at the day of adjournment, they may proceed, *Fitz. Ass.* 110. And though there be a new commission, and proclamation have been made, yet the old justices may proceed till notice, *Kell.* 106. And if it be brought in the *common pleas* or *king's bench* which is removed, it shall proceed there and be tried.

12 *H.* 4. 19. Fitz. Ass. 116. Br. 414.

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24 *E.* 3. 23. 7 *H.* 4. 4. And if it be there reversed for error, it may proceed there to summons and attachment *de novo*, 13 *Ass.* 22. And if one and the same person have several assises in one county, he may have one special patent for them all. *Reg.* 196. See special patent, *Rast. Entr. Ass. Special et per* 1 *E.* 6. *c.* 7. It is enacted that a new commission shall not discontinue an assise.

The form of the writ of assise 1 Form. Dyer 84.

At common law there are only two forms of writs. "One of freehold in this form viz. The king to the sheriff of L greeting: It is complained to us &c." *Vide ante.*

"But if security be found in chancery then it shall be. And because the aforesaid A hath made us secure of prosecuting his claim by B of your county, we command you &c. (if before the special justices, then it shall be until a certain day which our trusty and well beloved R & I shall make known to you, and in the mean time &c.) if it be returned in *common* bench or in the kings bench then shall be inserted the day of the return only. *Plowd.* 415.

If it be returnable in the *common pleas* or *king's bench*, it may be returned at a day out of term *per Statute article Cart. c.* 15. 27 *H.* 6. 2. The writ wanted *(tunc) sit, &c.* adjudged ill and *Plowd.* 414. the writ was returned *Coram præfatias justice* where none were named before, and ill.

In this form is the writ, though it be of an office or any profit apprender, so if it be by tenant *per Stat. Elegit, &c.* and the plaint shall be special. *Dyer* 84. 8 *Co.* 50. *b.* 27 *Ass.* 30. *F. N. B.* 178.

The other form of the writ is——"The king to the sheriff, greeting. It is complained to us, &c hath disseised him of his common of pasture in N (which belongs to his freehold in the same town or in another) within, &c. and therefore, &c of the damages, &c. and cause their names to be inserted in the writ, and summon, &c. that they be before our justices at E, or before us at W, on Thursday next after the octave of St. Michael next ensuing, or before our justices at the first assise, when they shall come into those parts, or before our trusty and well beloved R and I and those who shall be associated with them, at a certain day and place to be certified to you, &c."

If it be common in grosa precatur hoc. Reg. 197.

If before the justices of assise. If before special justices.

And in like manner are writs of common of turbary, piscary and the like, *Reg* 197. But if it be in *confiniis comitatus*, then the writ shall be such, "hath disseised him of his common of pasture in N, which belongs to his freehold in R, which is upon the confines of your county and the county of L within, &c."

On the confines of the county.

And although the form is to be strictly observed as before, yet 8 *Ass.* 24. bois or wood was put before pasture, and adjudged good, 8 *Ass.* 1. toft before a milne, and no exception.

And the plaintiff ought to find surety to prosecute either before the sheriff or in *chancery*, 2 *H.* 4. 20.

Pledges of prosecution.

And if the sheriff return that he hath not found pledges, he may do it presently in court, and the form of the return of these writs is such—"Pledges of prosecution of the within-named W, I V and R B, and they have nothing nor hath either of them any thing in my bailiwick by which they or either of them can be attached, nor have they a bailiff or bailiffs, nor are they or either of them found in my

Return of writ nihil nec est inventus.

bailiwick. The remainder of the execution of this writ appears by a certain pannel to this writ annexed, &c. *But if attachment be made, then the return is*, the within named W and I are attached by one ox of the value of five shillings, the remainder, &c. I B, knight, sheriff." *Plowd.* 73. 415.

Return of attachment.

Attachment by pledges.

The within-named W and I are attached by pledges I V R R allowed for a good return, yet where the writ was returned *by pledges the within-named W and I*, was disallowed by the better opinion, 5 *E.* 4. 10. or 109. *b.*

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Attachment by baily.

"I B, bailiff of the within-named W and I, is attached by pledges, &c. or hath nothing." 28 *Ass.* 40. 26 *Ass.* 33.

The pannel.

"The names of the recognitors of the assise of novel disseisin, between A, plaintiff, and W and I, defendants, of a tenement in S, summoners of the jury I V I R, *mainpernors* of the jury I B R, together with W Py and H Fry I B, knight, sheriff, summoner of the said jury I H and R S, *mainpernors* of the summoners of the said jury and of each of them.

Abatement of writ not favored.

Exceptions to the writ are not favoured *Pl. Com.* 96. *a.* *Misnosmer* of the defendant shall not abate the writ if another disseisor and tenant be named, or if joint-tenancy as to part be confessed, it shall abate only as to that part; for if there be a disseisor and tenant to any part, it is sufficient: So if one of the tenants be dead, or *nul tiel in rerum natura*, it shall not abate if there be a disseisor and tenant, 10 Co. 64. *b.* 43 *E.* 3 18. so entry into one acre shall not abate the whole writ, 21 *E.* 3. 34.

14 Ass. 8. 19 Ass. 14. 3 Co. 1.

22 Ass. 24. 23 Ass. 10. 29 Ass. 6a

What pleas are good in abatement of the writ.

Yet the writ shall abate for variance between it and the patent, 22 *Ass.* 20. And in an assise of

rent out of the manor of D in D it is a good plea that the manor extends into D and S, *Bro. Ass.* 84. It is a good plea in abatement that the sheriff is named defendant of covin, and that he is neither disseisor or tenant *per statute* 11 *H.* 6. *c.* 2. So that mayors and lords in ancient demesne are named tenants, to oust there their jurisdiction, *per statute* 9 *H.* 4. *c.* 5. But a disseisor shall not plead to the writ an entry since the last continuance, *contra* 37 *H.* 6. 2. nor that the plaintiff was seised the day of the writ purchased, 26 *ass.* 49. *a.* nor joint-tenancy, 12 *Ass.* 37. which are good pleas for the tenant, for he may plead *nul tenant del franktenement nosme*, *Rast. Entr. Ass. Barr* 4. and that the plaintiff was never seised. And the tenant may plead several pleas to the writ and over in bar, or to the assise, and the tenant may plead there is no disseisor named, that the land is in another town, 30 *H.* 6. 1. or that he has nothing but jointly with his wife not named, 44 *E.* 3. 8. but none shall plead *misnosmer* but the party himself, 30 *Ass.* 2. Two *dales* and none without addition is no plea, 29 *Ass.* 59. *Bro. Ass.* 304. 471. *Fitz. Briefe* 417. If the verdict find there is no disseisor named, the writ shall abate, 26 *Ass.* 35. 46 *ass.* 10. 34 *ass.* 3. Or if the assise find one is joint-tenant with a stranger not named, *Fits. ass.* 457. *contr.* 33 *H.* 6. 30. or the plaintiff that sues in right of his prebendary and be not so named, *Fitz. briefe* 675. A writ of forcible entry pending, is a good plea in abatement, *Rast. Entr. ass* in *bar* 3.

What by disseisor.

What by tenant. Rast. Ent. Ass Barr. 3. Rast. Entr. Barr. 3.

Abatement by verdict.

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If it be brought against husband and wife, and the husband dies, it shall abate against the wife, but shall stand against others, if there be a disseisor and tenant, 27 *Ass.* 45. but if the husband was the sole disseisor, it shall abate against all, 28 *Ass.* 37. *Fitz. Brief.* 883 *Br. Ass.* 474. If it be brought against joint-tenants, and one dies, it shall abate against all; so if one disseisor dies and another is

By death.

named tenant, but if the tenant infeoff one of the disseisors and dies hanging the writ, the writ shall not abate, 27 *Ass.* 47. but if any of the defendants were dead the day of the writ purchased, the writ shall stand if there be a disseisor and tenant. 26 *Ass.* 63. 29 *Ass.* 70.

Other matters which abate the writ.

In assise of rent distress pending, the writ shall abate it, 29 *Ass.* 52. If the plaintiff make an insufficient title in his plaint, yet it shall not abate the Writ. *Plowd.* 84. entry hanging the writ shall abate it, but it must be a trespassable act and declared to no other intent. *Plowd.* 93. *Inst* 245. But if it be a way, or by invitation which may excuse a trespass, it shall not amount to an entry. 4 *E.* 4. 60. or with another intent, as with the recognitors to view. *Pl.* 92. Or to prohibit waste, or to make claim to prevent a descent. *Lit. continual claim.* Or if the lord who hath an assise of the office of keepership hanging, enter and kill a deer. 8 *Jac. B. R. Brownlow's Rep.* 229. Escape of beasts into a common shall not abate an assise of it. In an assise of rent the tenant may plead that all the tenants of the land are not named, and good, but a pernor, &c. shall not plead it. *Fitz. Ass.* 11. 22 *H.* 6. 23.

Plea in abatement and over to assise.

If the defendant plead in abatement and over to the assise, the plea to the writ shall be first inquired, and if it be found the writ shall abate. 44 *E.* 3. 33. 8 *Ass.* 1. 44 *E.* 3. 23. If joynt-tenancy be pleaded to part, the plaintiff may confess it, and pray the assise as to the residue. 19 *ass.* 14 If
(270) the tenant plead to the writ and over to the assise, the plaintiff shall not reply to the plea to the writ, but it shall be first enquired. *Pl.* 91. Neither can he demurr to such plea, *ibidem.* 23 *ass.* 10. 26. *ass.* 63. *Fitz. ass.* 168, and *Bre.* 432. And there adjudged that it is not peremptory but *respon-*

deas ouster. 6. *E.* 3 31. If one plead to the writ, and do not conclude to the writ, it shall be taken as a bar. 23 *ass.* 9. 9 *ass.* 23. *Br. ass.* 117.

Summons and Severance lies in this action. 10 *H.* 6 22; and so for joint-tenants, 23 *ass.* 9. *Rast. Entr. ass.* in summons, &c. Essoin lies not in this action but upon a re-attachment it lies. *Rast. Ent. Reat.* in *ass* 3 44 *E.* 3. 5. 44 *ass.* 24. 2 *Inst.* 249. But the plaintiff may be essoined, and it shall be entered upon the record of the assise, and not upon the essoin roll. 30 *H.* 6. 1. 45 *ass.* 2. It lies also for the plaintiff upon a summons *ad sequendum simul*, but the 10 *H.* 6. 22. *contr.* that such essoin was quashed for good cause, and 22 *ass.* 79, it is said that in the *king's bench* they will not admit the plaintiff to be essoined in any assise. 2 *Inst.* 249 And note that *W.* 1. *c.* 42 is not intended of writs of *novel disseisin.*

Summons and severance.

Essoin.

For the form of the Plaint in assise, vide antea. f.

The form of the plaint in assise.

But if it be of an office thus:—"The assise comes to recognize if I, bishop of M, and T D have unjustly disseised E P knight of his free-hold in L, &c. and whereupon the same E P in his proper person complains that they have disseised him of the office of constable or keeper of the castle of L, and of 12 pence per week, to the same office belonging, at L aforesaid, from the issues and profits of the castle aforesaid, or of the lordship of L, for the time being there to be taken. And of the office of keeper of the park, &c." *Vide Rast. Ent.* for the residue, 74 *b, tit. assise*, and *vide* 75 *a.* and *vide Co. Entr. tit. assise, pl.* 1.

But it seems he ought to shew in what he received the profits of the office, as in the case of *Brownlow.* 12 *Jac. B. R.* for the *supersedeas* of an

office, and *Dyer* 14 or 146. But it seems he need not shew the year and day of the disseisin, 20. *Ass.* 16. And in assises of common, offices and all things that are against common right, the plaintiff ought to make a title in his plaint. 15 *Ass.* 15. 35. *H.* 6 6 and 7. So in assise of tithes, *Dyer* 83. So of all profits apprender, 34 *Ass.* 11. But in an assise for rent he needs not make a title, for it shall be intended *prima facie*, a rent service. But in an assise of rent charge or rent seck, it is the safest to make a title, and for this see a good precedent, 6 *Co.* 56. b. executors ought to make a title in their plaint, 28 *Ass.* 7. But where the plaintiff makes a title in his plaint, it is not peremptory, for if he have any other good title it is sufficient. 30 *Ass.* 5 But in an assise of mill the writ and count shall be general. *Co.* 4 *Lib.* 87 *a.* And in an assise of *Seven/ distress* and in *Cas, quo quis*, &c. the writ shall be general, and the count special. 8 *Co.* 50 *a.* And though an assise lies not of an unprofitable office, yet in the plaint there needs not be shewn the profit. 5 *E.* 4. 2. 22 *H.* 6. 9. 9 *E.* 4 6 8 *E.* 4. 22. 30 *Ass.* 4. 27, *H.* 8. 12. 32 *Ass.* 5. A good writ may abate by reason of an ill title where it need to have been shewn, *Plow.* 84. The plaint for a rent service shall be *cum pertinen*
rent nemy, 13 *Ass* 4 or 41. But tenant by statute by *elegit*, &c. need not shew any title in his plaint, 22. *ass.* 41. And note that in an assise of a new office he needs not shew that the profits belonging to it is granted. *Co. Lib.* 8. 49. *b.*

Where a title ought to be shewn in the plaint.

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What a disseisor shall plead.

A disseisor may plead all pleas which go in discharge of damages, but not in extinguishment of the right, as a release of actions personal, 1 *H.* 5. 4. He may plead no tenant of the freehold, or another action pending of an higher nature, or the plaintiff hath nothing but jointly with I S not named, 12 *Ass.* 37. Or entry into part of the land, hanging the writ, 35 *H.* 6. 13. But he shall plead nothing to

the writ which toucheth the tenancy. 45 *E.* 3 37. *H.* 6. 2. But he shall not plead an entry since the last continuance, 37 *H.* 6. 2. But 8 *Ass.* 2, it is doubted whether a disseisor may plead to the writ, *quod mirum*. He may plead *auterfoits acquit*, 11 *Ass.* 9. He may have many pleas at once, as *misnosmer*, *et si*, &c. *nul tenent* &c. *Et si*, &c. *Ne unque seise*, &c. *Et si nul tort*, &c. 22 *Ass.* 14. But quere, for it seems he cannot plead *misnosmer*, *Fitz. Ass* 120. He cannot plead that the plaintiff was seised the day of the writ, &c. 26 *ass.* 49. 27 *ass.* 30. *contr.* 28 *ass.* 41. Or that the plaintiff never had any thing, 27 *ass.* 65. Nor that the lands are in another vill. 30 *H.* 6. 1. Nor that there are many vills, in one hundred, not named 30. *ass.* 5. He shall not plead a recovery or matter of record without shewing it presently, *Fitz ass.* 120. Nor no disseisor named, 16 *ass.* 10. That one of the tur-tenants named was dead the day of the writ purchased, 29 *ass.* 70. The tenant may but he shall not plead *Hors de son fee*, 14 *ass.* 13. Nor can he plead join-tenancy, 12 *ass.* 37. He may plead ancient demesne, *Co. Lib.* 5. 103. It seems he may plead *misnosmer* or coverture of the plaintiff. *Fitz. Ass.* 120 or 220.*

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Raft Entr. in frech force. Brownlow's Entr. 63.

What pleas baily may have

Baily may plead a feoffment of a stranger whose estate his master hath, and so in without tort, or that his master recovered the land from the plaintiff and so, &c. or that the land was assigned to his mistress for her dower, or given to his master in exchange, and so in, &c. And so he may plead all pleas that excuse his master of a tort, but not to the writ, and yet he may plead *misnosmer* of his master, *Rast. Entr.* in assise body politic, 1 *Contr.* 22 *H.* 6. 44. He may plead dilatories and over to the assise, as that the land is in another vill, *Et si nul*

Kell. 119. b. 8 Ass. 2. 10 Ass. 4.

* Penalty for false pleading in assise. 1 R. 2. 6.

tort, &c. *Rast. Entr.* He may plead no tenant, *Et si nul tort*, &c. *Rast. Entr. Bar Breve* 14. 4. And he may plead *Null, Vill, et si*, &c. *dong. nul tenant, et si*, &c. That the plaintiff was never seised, &c. *Rast. Entr. ass. in re-attachment.* 1 But he cannot plead another writ pending, 8 *E.* 3 2. He may have all, 26 *Ass.* 1. *Fitz. ass.* 140. And he may say the lands are in another town, but cannot disclaim, 26 *H*, 6. 44. He shall not plead dilatories and rely upon them, but over to the assise, and therefore he shall not plead join-tenancy by deed or ancient demesne, because it is not triable by the assise; But he shall not plead a release to his master by the plaintiff himself, nor a feoffment with warranty, *Kel.* 117. He may plead all pleas triable by the assise, *per Hussey.* 6 *H.* 7 11 & 9. 9 *Ass.* 4 He may plead *hors de son fee*, 2. *E.* 3 8. He cannot plead any matter of record to the writ or in bar, nor any plea out of the point of the assise, and not by it triable, nor any plea which he cannot conclude *Et si trove ne soit nul tort*, &c. 1 *Ass.* 11. 2 *Ass.* 4. 8. *E* 3. 1 2. 19 *E.* 3. 13. 16. 9 *Ass.* 4 25 *Ass* 26 8. *H.* 6. 9. 21 *H.* 6. 58, 22 *H* 6. 44. 1. *E.* 4. 4. 8. *H.* 7 24. 11 *H.* 7. 11. *F. N. B.* 182. He shall not plead *hors de son fee* by some opinions, but *Contr. tenetur.* 2 *ass* 4. He cannot confess the action, 22 *Ass.* 35.

Kell. 117 b. Rast. Entr. ass. in fresh force a.

W. 2. c. 25.

2 Inst. 414 b.

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What pleas the party may have in person after plea by baily.

The defendant after plea by the baily may plead in person all pleas whereof a certificate of assise lies, as a release, 20 *ass.* 6. 50 *E.* 3. 9. but after plea to the assise by baily he cannot plead in bar, 48 *E.* 3. 7. but after remanding of the assise in right of damages, he may plead a release, recovery, or any other matter whereof a certificate lies, 23 *ass.* 33. but he shall not be admitted to such a plea after the jurors are sworn or the assise awarded, 29 *ass.* 18. but by 11 *ass.* 9. the tenant after the assise awarded may plead.

3 Ass. 11.

The tenant upon a re-attachment may plead *de novo*, if he will, 44 *E.* 3. 23. but he shall not plead to the writ after he has pleaded in bar, but he may wave his bar, and plead to the assise, 17 *ass.* 17. 32 *ass.* 2. He may plead *nul tiel in retum natura*, as one of the plaintiffs, *et si*, &c. *nul tort*. 44 *E.* 3. 26. 50. He may plead bastardy, but after an adjournment upon it he shall not be admitted to plead a release, &c. 23 *ass.* 5. One shall not plead *hors de son fee*, *misnosmer*, *et si.* &c. *nul tort*, 3 *E.* 3. 15. One may plead that *sur*, so *nient nosme*, *et si*, &c. *nul tort* 29 *ass.* 70. If he plead that the land is in another vill, he shall not plead over *nul tenant*, &c. 30 *H.* 6 1. nor that the plaintiff had any thing but jointly with I S not named, 30 *ass.* 2. An infant pleaded a plea which was adjourned for difficulty, and he was admitted to plead again, and it was remanded, 44 *E.* 3. 10. 12 *H.* 4. 19, 20. If he plead joint-tenancy by deed, he shall re-plead over, 23 *ass.* 10. *Pl.* 91.

What pleas shall be had after others.

3 Ass. p. 9.

Raft Entr. in Ass. in Kent 1.

The tenant may plead ancient demesne, 21 *H.* 6. 57. He cannot plead non-tenure, or that he hath nothing, nor no tenant of the freehold named, 8 *ass.* 14. He may plead joint-tenancy, coparcenary, or tenancy in common, and the plaintiff is tenant at will to the defendant, 29 *ass.* 22. None can plead *misnosmer* but the party himself, 29 *ass.* 70. None can plead in bar without taking the tenancy upon him, 37 *H.* 6. 23, 24. *auter* assise pending, 14 *ass.* 7. *Rast. Entr.* assise in bar, 4. *nul poet plead misnosmer del vill*, but the tenant, and although one plead to the assise, another may plead joint-tenancy with him, 14 *Ass.* 16. *Quod permittat pendant* is a good plea in an assise of common, 15 *Ass.* 43. If the tenant plead in bar to one plaintiff and to the assise to another, it is a waver to the bar, 30 *Ass.* 7. If the tenant plead *nul tenant*, it is to the assise, 30 *H.* 6. 61. That one of the tenants is dead the day

What pleas the tenant shall have. Raft. Entr. Ass ancient demesne. 1. 2. Browal. Entr. 57 Raft. Entr. Assise 4.

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of the writ purchased is ill, if there be another disseisor and tenant, 29 *Ass.* 70. *Fitz. ass.* 116. *Br.* 415. The tenant may plead in bar, and pray that the age of the plaintiff may be viewed, but he cannot plead generally that he is of full age. If one plead a foreign plea and pray that it may be inquired by the assise, and does not say *per patriam*, it shall be tried by the assise and not adjourned, 14 *H.* 4. 10. No tenant named is to the assise, 30 *H.* 6. 1. Joint-tenancy by deed, *Rast. Entr.* as in bar, 3 *Br.* 7. In assise of rent he may plead *nul pernor, et dehors de son fee*, and *nul pernor* and tenant, in another bill, *et null tort*, *Rast. Entr.* 1. 18 *H.* 8. 3. *b.* To plead a feoffment with warranty is double without relying upon the warranty, 14 *H.* 8. 24. *per Brudnel.* And note that if an assise be brought against a ter-tenant by a false name, he may appear and plead, 24 *H.* 8. 1. *per Bromley.*

What matters shall be in bar.

The deed of the ancestor with warranty is a good bar, 44 *E.* 3. 5. 8 *H.* 4. 7. So of a descent without a continual claim, 44 *E.* 2. 1. but not if it be hanging the writ, 1 *H.* 6. 1. So a former recovery in a writ of assise is a good bar, 44 *E.* 3. 4. 23. *Ass.* 16. That the plaintiff ousted him and he presently re-entered, 45 *E.* 3. 24. That the plaintiff was not seised within thirty years is a good bar, 13 *H.* 4. 17. But the feoffment of the plaintiff himself is no good bar, because it amounts to the general issue; but his feoffment to I S whose estate the tenant hath is good without colour, 15 E. 4. 31. But by some books it is not good without a warranty and relying upon it, 49 *Ass.* 4. 6 *H.* 7. 14. nor by the feoffee, 30 *Ass.* 40. Coparcenary and that the plaintiff is seised as his tenant at will, is good, 11 *Ass.* 29. Or to say that he is seised at will, 12 *Ass.* 1. So of tenancy in common, 22 *Ass.* 29. 29 *Ass.* 22. So of joint-tenancy Another assise pending is a good plea, 12 *Ass.* 1. but not before the plaintiff's

Rast. Entr. 22 bar 1, 2 Brownl. Ent. 58.

deed; arbitrament seems to be a good bar, 12 *Ass.* 20. Outlawry in trespass pleaded in bar, 13 *Ass.* 5. Another action of a more high nature depending is good, 29 *Ass.* 40. A lease or feoffment of the plaintiff himself is no good plea, because it amounts to the general issue *nul tort*, 38 *ass.* 26. A (275) lease for life or years the reversion to the plaintiff, a feoffment of the plaintiff with warranty and relying upon it, is good, 18 *E.* 4. 10. 21 *E.* 4. 65. Release of one of the plaintiffs is only a bar to a moity, 18 *E.* 4 14. *Fitz. Bar* 39. 59 Recovery of the land in another vill in the same county is good, 24 *E.* 3 45. 1 *Ass.* 17. Recovery in a forcible entry is a good bar, 11 *H.* 7. 15. If one of the defendants plead to the assise, the other may plead joint-tenancy with him, 14 *Ass* 6. That the plaintiff is an alien is good, 22. *Ass.* 25. If the plaintiff makes a title in his plaint, it is not sufficient for the defendant to avoid it, but must make to himself a title, 36 *H.* 6. 33.

If the tenant plead specially in bar, he may after wave it at his pleasure and plead the general issue though it be entered, 34 *H.* 6. 29. 44 *ass.* 1. or where the jury is ready to pass, *ibidem* or at another day when it remains *pro defectu juratorum fuit agard*, 34 *H.* 6 10. And it is to be noted that in all cases when the defendant pleads any special title by a stranger which binds not the party in his blood, he shall not give colour, as where the defendant relies upon a warranty, estoppel, fine, recovery, or act of parliament. 3 *E.* 4. 2. *Fitz. Trespass* 160. 22 *E.* 4. 4. 5 *H.* 7. 10. But if he pleads matter which only binds the possession and not the right, as a descent, no colour needs to be given. 19 *H.* 6. 41, 22 *H.* 6. But if the defendant makes title to himself by the plaintiff, he needs not give colour, as by a lease for years, 15 *E.* 4. 31. Or by a lease for life, 6 *H.* 7. 14. so when

1 Afs. 17. Br Afs. 111.

Where the defendant shall give colour. 2 R. 3 8 1 H 7. 19 R Entr. Hill. Aff Bar 1. 3 Brownl. Entr. 59. Raft. Ent. Afs. Bar. 1 2. 4 Co. 10. 90. R. Entr. corpe polit.

the defendant pleads to the writ, or the action of the writ no colour needs, 21 *E.* 4. 4. and if one justifies as servant to a stranger by special title, he shall give colour, otherwise upon a general title, as if he says that such a one was seised in fee, and as servant, &c. But if he says he was seised in fee, and infeoffed I, and that he as servant, &c. he shall give colour, 2 *R.* 3. 8. 1 *H.* 7. 19. But if one plead a general bar, as that the place is the freehold of I S, &c. or the tenant defend himself, &c. he shall not give any colour. Every good colour is to have four qualities. 1. It ought to be a doubtful matter to the lay people. 19 *H.* 6. 21. 11 *H.* 4. 3. 19 *E.* 4. 3. 23 *H.* 6. 54. 10 *H.* 6. 8. 36 *H.* 6. 7. 20 *H.* 6. 27. 2ly. Every colour ought to have continuance and not to be of any estate determined, or by one whose estate is determined. 2 *E.* 4. 19. 3ly. It ought to maintain the nature of the action as tenant in the assise, not as guardian, 32 *H.* 6. 6, nor to the ancestors when the action is of one possession. 4ly. It ought to be by the first in the conveyance of the title, otherwise all is waved. 10 *H.* 7. 14. And note that color shall not be given where tithes are in demand. *Co. lib.* 10. 91. *a.* And in assise of common, approvement is a good bar without colour. *Fitz. ass.* 137. 7 *E.* 3. 67. So if the tenant plead a lease for years of a stranger, it is a good excuse without colour. *Dyer* 246. And it seems there needs no colour where the defendant by his plea admits that the plaintiff had such estate which is defeated by conviction, entry, &c. 5 *H.* 7. 29, *per Brian.*

Qualities of good colour.

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Raft. Entr Aff Releafe with colour in bar.

Replication and matter concerning it.

And note that in all cases where the defendant shall give colour in his plea there the plaintiff may make his title at large; but where the bar is not at large, but the defendant gives the plaintiff title and destroys it as a feoffment upon condition, &c. there the plaintiff cannot make his title at large. 5 *H.*

Title at large.

7. 32. *b.* And it seems by some that if the tenant makes his title by fine, feoffment with warranty or act of parliament, that a dying seised is no good title for the plaintiff against it, without shewing how the ancestor of the plaintiff regained the possession of the land. 5 *H* 7. 32. *Fitz. title.* 8. 10 *Ass.* 23 5 *H.* 7 29 But if a feoffment with warranty be pleaded, a dying seised is a good title, as it is agreed. 18 *Ass.* 18. *Fitz. title.* 9. So if the tenant plead a recovery against a stranger, descent is a good title 10 *H.* 4. 9. Some other books agree that a descent is no good bar against a fine, recovery, or act of parliament, but admitted against a feoffment with warranty. 17 *Ass.* 18. 29 *Ass.* 25. 9 *E.* 3 *Fitz. ass.* 1. *Br. title* 55. But other books make a difference, a fine or recovery, executory, and executed against the last, they admit a descent a good title, but not against a fine, &c. executory. 28 *Ass.* 17. 10 *Ass.* 22. 33 *E.* 3. *Fitz. title.* 4. But a descent is a good bar against a feoffment and warranty of a stranger, and with this agrees 28 *H.* 6. 5. *Fitz. title.* 19. If the tenant give colour to the plaintiff, he may make his title at large, *Rast. Entr. ass. bar.* 2. *Replic.* 1. 2. Where the bar is traversed, as to say that before the tenant had any thing he was seised and disseised and traverse the matter of the bar, *Fitz. ass.* 15, 16. If the tenant give to the plaintiff a possession and no colour, then may the plaintiff traverse the bar without a title, but if he give to him colour and no possession, the plaintiff ought to make a title, 19 H. 6. 20 H. 6. 22 H. 6. 1. 26 H. 6. *Fitz. title* 18; and then it is not good to say that he was seised and disseised, and so traverse the bar without conveying to himself the possession by feoffment, &c. In assise of rent it is a good title by prescription in him and all his ancestors, whose heir he is, 18 *Ass.* 17. Or to him and his predecessors, *Fitz. tit.* 34. 18 *E.* 3. But not that he and all those whose

18 E. 3. 21 Fitz. title 30, 31.

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estate he hath, 31 *Ass.* 23. *Fitz. title* 13; but 23 *ass.* 6, seems *contr.* and a dying seised of rent is no good title to it, 10 H. 7. 23. *contr.* 30 *ass.* 33. If joint-tenancy by deed be pleaded, he shall reply sole seised the day of the writ purchased, 15 *ass.* 13. If it be without deed, the like replication, but no process upon the statute, *Fitz. ass.* 16. *Br.* 290. If a record be pleaded, see what shall be the conclusion, 11 *ass.* 2. If a record be pleaded, the plaintiff shall reply *habeas recordum hic ad proximum, &c. Fitz. ass.* 110. If a plea be to the writ and over to the assise, no replication shall be to the plea or to the writ.

Pernors.

If the defendant plead there is no tenant of the free-hold named, the plaintiff may reply the defendant disseised him and made a feoffment to persons unknown, and takes the profits, and this by the statute of 1 *R.* 2. 9. 2. *Inst.* 445. 1 *H.* 5. 4. 12 *H.* 4. 21. 9 *H.* 6. 14. 22 *H.* 6. 16. 39 *H.* 6. 44. 1 *E.* 4. 24 *E.* 4. 17. 21 *H.* 6. 55. 14 *H.* 7. 17. And it seems this matter may be given in evidence upon *Nul tort.* 2 *Inst.* 445. And if any defendant be averred *pernor*, he shall have no other plea but traverse the disseisin and *pernancy*, *Br. Ass.* 403. But if any tenant of the freehold be named, then it is out of the statute, and he cannot avert *pernancy*, 1 *H.* 5. 4. And it is there said that this statute extends as well to join-tenancy as non-tenure.

Election of the tenant. 1 Brownl. Entr. 60, 64.

If the assise be brought against many, and one takes the tenancy upon him and pleads, and another pleads *absque hoc quod alter aliquid habet, &c.* the form of which, see afterwards, then the plaintiff ought to choose his tenant at his peril, and demur upon the others if they have pleaded in bar, for none without the tenant can plead in bar. *Br. Ass.* 403. *Dyer* 244. 35 *ass.* 2. & 3. And then the tenancy shall be first inquired and then the bar, and

if the plaintiff miselect, the writ shall abate, 8 *Ass.* 1. 44. *E.* 3. 23. *per le reporter*, 9 *E.* 3. *Br. Ass.* 383 But others conceive that the plaintiff shall be barred, as *Lit.* 33. *H.* 6. 36 *a.* 20. *ass.* 4. *Mes.* 42 *ass.* or 12 *ass.* 1. *Contr.* although the plaintiff miselect his tenant, if there be a tenant and disseisor named it is sufficient and the plaintiff shall recover, and sometimes it hath been admitted that the tenant after he hath been elected shall plead in bar, 28 *ass.* 42. 22 *Ass.* 7. but 48. *E.* 3. 7. is *contr.* But if there be many defendants who plead severally in bar and no traverse, *sans ceo que l' autre riens ad*, the plaintiff needs not elect his tenant, but may reply that they are join-tenants, and plead to the several bars, *Kell.* 117. but if a disseisor plead in bar, and the tenant plead to the assise, the plaintiff is not bound to elect, but for his advantage he may.

If the plaintiff makes his title at large, then the tenant may say *venit l' assise sur le title*, 15. *H.* 7. 13. So if he confess and avoid the title of the defendant, &c. and all this appears at large, 5 *H.* 7. 30. Note where the assise is taken upon the title at large, it shall enquire of the seisin and disseisin, but if upon traverse of the bar, then in right of damages only: and note that if the title of the plaintiff be by matter of record or matter arising in a foreign county which is not triable by the assise, then he shall not say, *venit assisa super titul. Finch.* 98 *b.* 5 *H.* 7 29. But if the tenant plead an ill barr, and the plaintiff makes title, it shall be as a title at large, and any other title shall serve the plaintiff, and the seisin and disseisin shall be inquired, *Kel.* 170. Veigne l'assis sur le title.

The tenant shall not vouch any person not being party to the writ or present, and who will presently enter into the warranty, 8 *Ass.* 17. He cannot vouch after plea by baily, *Fitz. Ass.* 144. 8. *E.* 3. Voucher.

Receit. 39. So of receit if it be alledged that the land is seised into the king's hands, the escheator shall be examined, &c. 9. H. 7. 8. But if the escheator be not present, it shall be inquired by the assise, but if the tenant infeoff the king hanging the writ, the assise shall be awarded, 38 *Ass.* 16. But if the king have interest, it shall not, *Rege in consulto* 22 *Ass.* 24. 28.

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Aide of the king.

Foreign plea. If the plaintiff plead any foreign matter or fact done in a foreign county, or there are witnesses named which live in a foreign county, the assise shall be adjourned in B. and there tried, or by *nisi prius* in the foreign county, and the jurors may there inquire of damages as incident; but if the witnesses do not appear upon the grand distress, the assise shall be awarded, 8 *Ass.* 15. 5 *Ass.* 7. Or if the tenant make default it shall be remanded and taken at large, 17 *Ass.* 31. 39 *Ass.* 3. 10. If the matter in bar be found against the tenant, it shall be remanded in right of damages, but if the plaintiff will release his damages, he shall have judgment presently in B. 8 *Ass.* 15. 6 *Ass.* 4. 14 *H.* 4. 9, 10. Where one pleads a foreign matter, and in conclusion prays it may be inquired by the assise, he was ousted of adjournment, because he did not pray it might be inquired *per patriam*; so the justices may by the statute of 9 *H.* 3. 12 adjourn at B. for difficulty, where the justices may adjourn before themselves in their circuit or at *Westminster*, &c. *Dyer* 375. 47 *E.* 3. 1. 27 *Ass.* 1. 12 *H.* 4 19, 20. And if the assise be adjourned in B. for difficulty they may plead to issue, and then it shall be adjourned into the proper county, 1 *H.* 4. 4.

Adjournment.

Remand.

Adjournments shall be indorsed upon the back of the pannel, *Plowd.* 415. And upon a general patent the adjournment shall be from one sessions to another, but upon a special from day to day, 32 *H.*

6. 10. *Fitz. Ass.* 20. Associates may adjourn as well as the first justices by writ of *si non omnes*, &c. 12 *H* 4. 19. Upon an adjournment in B. it is an exception that the justices have no patent, 29 *Ass.* 21. The plaintiff may elect his tenant after the assise is remanded, 23 *Ass.* 16. And the assise shall be demanded every day of adjournment upon demurrer, &c. although it shall not be taken, 44 *E.* 3. 11. If adjournment be upon the plea of one of the defendants, the others have no continuance, but when the assise is remanded, they shall be re-attached, 22 *Ass.* 11, because they had no continuances, nor shall plead, 22 *Ass.* 14; yet, 12 *Ass.* 12. and 13. is, that if one of the tenants be adjourned, the other shall have *idem dies. quær. tamen;* note that assises usually are adjourned for difficulty, to try a foreign issue and upon demurrer.

The continuance of an assise shall be by *justiciarii non advisantur*, and not by *dies datus*, 22 H. 6. 12. And if the tenant appear by baily, the continuances shall be between the party and the baily, 1 H. 4. 4. And so of *dies datus partibus prædictis ac partibus et ballivo*, 11 H. 7. 11. And there ought to be entries made of every juror sworn and continuances from day to day, otherwise it is error, 39 H. 6. 17. 38 H. 6. 11. If an adjournment be to *Wesminster* for difficulty, no process shall be awarded against the jurors, otherwise of an adjournment to the next assises, *R. Entr. ass. bar* 4. And if the defendant have a day over the continuance shall be by *idem dies. datus est partibus*, and not to the defendant, *ibidem per non misit breve* and against the jurors, *ibidem continuance* 1. 2. (280) Continuance.

The process in assise against the party is attachment, and upon default or *nihil* returned, the assise shall be taken, but against the jurors it is summons, *habeas corpus* and *distringas ad infinitum*, *R. Entr.* Proceſs.

in process, and the jurors shall not be put to *maint. prize* the first day, 7 *Ass.* 14. And upon discontinuance upon *non venit* of the justices, a re-attachment against the party and re-summons against the jurors, but if a discontinuance be after the receit of the wife, a re-attachment shall be against the husband and wife, or wife sole, 24 *E.* 3. 23. If the tenant make default upon adjournment and so the assise is awarded by default, and after there be a discontinuance for *non venit* of the justices, no re-attachment shall be of the tenant, because he hath lost his answer and challenge, 28 *Ass.* 42. If one defendant plead a foreign plea which is adjourned and remanded, a re-attachment shall be awarded against the other defendant, but a general re-attachment is not sufficient, 26 *Ass.* 3. If the tenant bring a *certiorari* to remove the assise into the *king's bench*, and the record be delivered to the tenant, and he retains the record, upon motion a *capias* shall be awarded against him, 1 *ass.* 14. *Remain pro defectu visus*, *R Entr. ass. bar* 2. Process against joint-tenants by deed, *R. Entr. ass.* in *brief* 8. Precept to the sheriff in assise, *Rast. Entr. ass.* in special, general precept, *ibidem*, in process, 1.

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Receit.

No receit lies in this action but of the party to the writ who appeared, neither after the assise awarded, 3 *H.* 6 *Br*, 299. But lies after an adjournment in *B.* 3 *H* 4 18. Or upon failure of record, 7 *H.* 4. 6. Or at the day after, *reman. pro defectu juratorum* or *recognitorum* 13 *ass.* 2.

Awarded at large by default.

If the tenant make default, the assise shall be awarded at large upon the seisin and disseisin and damages, but not upon the title of the plaintiff, *Pl.* 415. So if he make default upon the adjournment of a foreign plea, it shall be remanded and taken at large, 39 *E.* 3. 10 17 *ass.* 31. 22. *ass.* 11. 36 *ass.* 39. And if there be a discontinuance for *non*

venit of the justices, there shall be no re-attachment because he has lost his answer and challenge, 22 *ass.* 11. Baily pleads to the writ and over to the assise, and makes default, it shall be taken at large without respect to the plea to the writ, 10 *ass* 30. And if it be against many, and one plead a foreign release which is adjourned, and makes default, it shall be awarded at large without a re-attachment against his companions, 28 *ass.* 42. but with a re-attachment against his companions *per* 22 *ass.* 11. *Rast. Entr, ass. in rent.* 3. In assise of rent, if the tenant makes default, the plaintiff shall ascertain what rent he demands, 2 *Ass.* 4. 17 *Ass.* 29. 26 *Ass.* 6. But he may make his title by deed, bearing date in a foreign county, *Dyer* 153. b. And where demand was of a rent service, the jury found *hors de son fee*, and a rent by prescription. 13 *Ass.* 4.

If an infant be plaintiff or defendant, the assise shall be taken at large, but if a record be pleaded in bar, he shall answer to it, 22 *H.* 6. 51. or confess and avoid it, 26 *ass.* 16. And although the deed of his ancestor with warranty be pleaded, it shall be taken at large, 14 *E.* 3. 10. 12 *H.* 4. 19, 20. If a fine of the ancestor be pleaded in bar, although he shall answer to it, yet the assise shall be taken at large, 28 *Ass.* 52. But if an infant plead in bar and join issue out of the point of the assise, the circumstances of a deed pleaded against him, *i. e.* the delivery, time and place, &c. shall not be inquired, otherwise if he had pleaded to the assise at large, 28 *Ass* 51. *Fitz. ass.* 99. 116. 10 *Ass.* 1. But if a bar be pleaded against him, it is otherwise, 31 *Ass.* 18. 22. 38 *Ass.* 24. *Fitz. ass.* 99. *Kell.* 111. yet he may plead *hors de son fee*, and shall be taken at large, 43 *Ass.* 5. And if he plead a record and fail, yet it shall be taken at large, *Fitz. ass.* 442, 367. *Br.* 461. And if one plaintiff be an infant and his coparcener of full age, and the

At large for the infancy of the plaintiff or tenant.

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Kelw. 111. a.

deed of their ancestor be pleaded in bar with warranty, it shall be taken at large for the infant, and the other shall answer to the deed and warranty, 26 *ass* 65. 29 *Ass.* 53. An infant shall not be a disseisor by his assent or admittance in pleading, 3 *H.* 4. 16. 28 *Ass* 52. Although he plead by baily, yet he shall not be admitted to plead again after the assise awarded, 8 *Ass.* 17. or jury sworn, 3 *Ass.* 11. But if it be awarded against him by default and *remanet pro defectu recognitorum* at another day he shall be admitted to plead in bar, 29 *Ass.* 36. If one be of full age, and sues as an infant *per* guardian, the tenant may plead in bar and say, that he is of full age, and pray that he may be viewed, *Fitz. ass* 116. 12 *E.* 3. 12 *Ass.* 36. Six of the recognitors at least of the assise ought to view the lands before the taking of the assise, that the plaintiff may by them be put into possession by their view, 22 *E.* 4. 34. But if things not visible, as tithes and profits of fairs, &c. view needs not; but of offices to be exercised, in a certain place, the view shall be where the office is exercised, as of an herald's office at the place where the funeral was. Of filacers office, where his seat is in court, 2 *Brownl.* 268. And if the jurors have had the view without the sheriff it is sufficient, *Dyer* 62. If they know the land it is sufficient without the view, 19 *H* 6. 43. If they be near the land though a hill intervene, it is sufficient, *Dyer* 18. *b.* The recognitor shall be examined upon a *voir dire* whether they have had view, and if not, they shall be adjourned upon a pain to take the view, 19 *H.* 6. 43. 22 *Ass.* 22. And if they make not the view upon demand, they shall be adjourned upon pain, and to be amerced, *per* 24 *E.* 3. 26. 50. If rent be granted out of land in one county, and a distress to be made in another, the assise shall be brought where the rent issues, 31 *Ass* 27. 41 *Ass.* 3. 10 *Ass.* 4. 10 *E.* 3. 18. *Br. ass.* 150. If a rent-charge be.

View of the recognitors.

Where assise shall he bro't for a rent.

granted out of such a piece of land, and a power to distrain in another, the tenants of both lands shall be named in the assise, 1 *ass.* 10 10 *ass.* 4. And it was held by *Pigot*, 7 *E* 4. 1. That if issue be taken upon a collateral matter out of the point of the assise, no view needs to be, *quære tamen.* Tenants of both lands to be named.

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By the statute of 42 *E.* 3. *c.* 11. the sheriff shall make his pannel of the recognitors four days at least before the sessions; but by the statute of 6 *H* 6. *c.* 2. the sheriff shall make it six days at least before the sessions, and give the parties copies if they be demanded, under the penalty of 40 l. Return of the Recognitors.

The plaintiff may make his challenge to the sheriff in his original writ and have it directed to the coronors, *Pl* 73 If the assise be awarded by default and the plaintiff challenge any of the polls, they shall be presently withdrawn, 28 *Ass.* 42. In all other cases the ordinary rules of challenges shall be allowed; only in a certificate of assise the party shall not have his challenges to the recognitors of the first inquest, 12 *H.* 4. 9. Challenge to the array shall not be till issue joined, and shall be taken as in other cases, and then process shall be awarded to the coronors, *Vide le form R. Entr. Ass.* in challenge. Challenge.

Tales de Circumstantibus shall bot be granted, but *Decem Tales Co.* 10. 105.

Trial of all assises shall be in the proper county, but if antient demesne be pleaded, it shall be adjourned and tried by doomsday book, *R. Entr. Ass.* in *antient demesne*, 1, 2. 22 *Ass.* 24. If the land be alledged to be in another county it shall be inquired by the assise, 29 *Ass.* 51. Bastardy in issue shall be adjourned and tried by certificate of the bishop, 38 *Ass.* 30. But if it be not the point Trial.

in issue, it shall be tried by the assise, 39 *Ass.* 14. 38 *Ass.* 24. A former assise pleaded in bar shall be tried by both juries if in the same county, 22 *Ass.* 16. Of an office in the *common pleas*, shall be tried by officers and attorneys in the same bench. If a foreign plea be pleaded, it shall be adjourned into the *common pleas*, and shall be there tried or by a jury in the foreign county. *Non attachiatus per* 15 days shall be tried by examination of the sheriff or bailiffs if present, otherwise it shall be inquired by the assise, 9 *H.* 4. 1. *Fitz. Ass.* 461. If it be pleaded that the land is seised into the king's hands, it shall be tried by examination of the escheater if present, otherwise by the assise. If the tenant plead a former recovery, and the
(284) plaintiff aver it to be of other lands, it shall be tried by the former recognitors and the new ones, 22 *Ass.* 16. but if he say, *Nient Comprize*, it shall be tried presently by the assise.

Matters inquirable by the assise.

If the tenant plead in abatement or to the assise, the seisin and disseisin shall be inquired, 26 *Ass.* 65. So if issue be upon villenage. 13 *Ass.* 12. But if pernancy be in issue, it shall not be inquired, 30 *H.* 6. 1. *Fitz. Ass.* 16. and so in all cases where an ouster is expressly or implicitely confessed it shall not be inquired, as if a release be pleaded, 8 *Ass.* 15. and so if a deed be pleaded and not found, 11 *Ass.* 26. 17 *Ass.* 17. 17 *Ass.* 2. Or if a record be pleaded and fails, 23 *ass.* 3. 12 *ass.* 1. 11 *H.* 4. 51. 5 *ass.* 16. If one plead to the assise, and another release, seisin and disseisin shall be inquired against one in right of damages, against him who pleads the release, 23 *ass.* 11. Or if the tenant pray the assise upon the title, damages only shall be inquired, 27 *ass.* 65. So if the tenant plead a deed, &c. and after wave it, it shall inquire only of the seisin, *Fitz. ass.* 117. 13 *E.* 3. 34 *H.* 6. 32. 16 *ass.* 1. If the bar be

not good, seisin and disseisin shall be inquired, 2 *H.* 7. 4. 32 *H* 6. 15. *Entr.* 28 *ass.* 21. 6 *H.* 7. 2. *Vide Co. Lib.* 10. 119. 11 *H.* 4. 27. That although the defendant plead a release, or, &c. which is found against him, yet the seisin and disseisin shall be inquired.

What shall be a good faisin to have an assise.

The heir shall have an assise of the seisin of his termor, 45 *E* 3. 25. So a reversioner by fine, 44 *E.* 3. 16. Successor upon the seisin of his predecessor, *Pl* 193. *a.* 46 *E* 3 14. 26 *ass.* 36. 34. *ass.* 1. If one enter for me, and in my name, this is a good seisin for me to have an assise though I know nothing of the entry, but approve of it afterwards, 11 *ass.* 11. If one dare not enter, but approach and is disturbed, this is sufficient seisin, 38 *ass.* 23. Rent granted upon condition which is broken, and distress and rescouse made. *Fitz. ass.* 96. Seisin of part of the rent is good, 8 *E.* 3. 12. *Fitz. ass.* 141. *Co. Lib* 6. 57 *a.* But seisin of fealty is not good for rent to have an assise, but an avowry for it. *Fitz. ass.* 432. *Br.* 454. Seisin of rent by tenant by statute, *Elegit*, or by bailey or procurator *per Mandatum Domini*, by the tenant after a feoffment and before notice is good, *Co. Lib.* 6. 57. But tenant for years may gain seisin for the benefit of the reversioner, *ibidem.* If I have right to two acres, and my entry into one is taken away in one county, and I enter into that in which my entry is taken away in name of both, it is not good, otherwise if my entry had been lawful, *Kell.* 20. *b.*

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Who shall be said a disseisor who not.

The queen cannot be a disseisee or disseisor, but if the patentee enter where the king hath no right to grant, the patentee is a disseisor, 1 *H.* 4. *c.* 8. And if the escheator or any other officer of the king seise land without cause, he is a disseisor. *W.* 1. *c.* 24. 3 *E.* 1. *c.* 24. The king cannot be disseised

if he have the land as guardian only, 8 *H* 4. 17. *Fitz. Ass.* 431. seems that he may be a disseisee *quod mirum* If the guardian make a feoffment, both feoffor and feoffee are disseisors, *W.* 1. *c.* 47. *W.* 2. *c.* 25. If the demandant enter pending a *precipe quod reddat* he is a disseisor, 40 *E.* 3. 42. If the demandant after verdict and before judgment release, and then sue execution, he is a disseisor, 5 *H* 7. 4. 43. *Ass.* 19. *Fitz. Ass.* 70. If one execute an office by appointment of the court, to which another hath right, he is a disseisor, *Dyer* 115. If estovers are to be delivered without request and are not, it is a disseisin, *Co. Lib* 5. 25. If the owner of the soil depasture all the grass, or cut all the wood he is a disseisor of common or estovers, *Co. Lib.* 9 112 *b. Br. ass.* 490 Some say the plaintiff shall not have a distress for rent before he hath recovered it; if he do distrain it is a disseisin, 46. *E.* 3. 13. If the demandant upon a void recovery enter, he is a disseisor, 28 *ass* 17 4 *H.* 6. 26 8. *Ass.* 22. otherwise if it be only voidable, *ibidem.* The lessee surrenders or levies a fine to the lessor, and continues possession, he is a disseisor or no disseisor at the election of the lessor, *Dyer* 62. If the termor be ousted it is a disseisin. or not, at the election of the lessor, *Dyer* 178. If my tenant pay my rent to another, it is a disseisin, or not at my election; of common, rent, tithes or other profit apprender, a man shall be disseised or not disseised at his election 8 *Ass.* 4. *Hob.* 1. *Edit.* 461. If tenant at will or sufferance makes a lease for years, he is a disseisor, 12 *E.* 4. 12. or if tenant for years make a feoffment, 10 *E.* 4. 18. 49 *H.* 6. 18. 3 *E.* 4. 17. If a termor continue possession, after the term ended, he is no disseisor, 9 *H.* 4. 14. *quare* if he be not a disseisor if the lessor enter and he continnes possession after, I conceive he is. A disseisor makes a lease rendering rent, the disseisee re-enters, the lessee continues payment of the rent, he is a disseis-

Disseisin alias election.

et, *Dyer* 134. *Br. disseisor* 76. An infant or feme covert shall not be disseisors by their assent or admittance in pleading, 13 *ass* 1. 3 *H.* 4. 7. 2 *ass.* 2 10 *Ass.* 1 11 *ass.* 14 12 *ass.* 33. A feme covert is infeoffed, the feoffee is a disseisor, 9 *ass.* 2. A feme covert may be a disseisor by her own act. 21 *E.* 4. 53. If one enter by release of an infant, he is a disseisor, 7. *ass.* 17. If a guardian assign dower to a wife who is not entitled, they are both disseisors. 21 *E.* 3. 4. 5. If a manor extend into two counties and one enter into one part in the name of both, he is not a disseisor of the other, 22 *H.* 6 10. If one enter to my use and I consent before or after, I am no disseisor except I command it, 15 *E.* 4 5, *per lit*, 21 *H.* 7, 35. *contr* 15 *ass.* 11. 12 *E* 4. 9 38 *ass.* 9. He that diverts a watercourse is a disseisor of a milne, 9 *ass.* 19. An attorney who delivers seisin to me by one who has no right is a disseisor, 10 *ass* 22. If he makes livery in another form than his warrant, he is a disseisor, 12 *ass.* 24. 1 *H.* 4. 3. 26 *ass.* 17. If one would enter into land to which he hath right and is disturbed, it is a disseisin, 11 *ass*, 21. To council one to make an unlawful entry is a disseisin, 14 *ass.* 12 17. *ass* 14. 27 *ass.* 30. If I am cutting trees, and one who hath right command me to forbear, this is a disseisin, *ibidem*. One who commands a disseisin, is a disseisor, 29 *ass.* 59. But if one command another to enter, and he hath no right, he who entered only is a disseisor, 34 *ass.* 12. If one enter by a void grant, he is a disseisor, 24. *E.* 3 32. Lessee for life rendering rent upon condition which is broken, the lessor distrains and detains the distress and enters, it is a disseisin, 14 *ass.* 11 If a termor alien to one for life, remainder to another who enters, he is a disseisor, 43 *ass.* 45, 50 *E.* 3. 22. He who sues execution against the issue in tail, is a disseisor *Fitz ass.* 77. 18. *E.* 3. The feoffee of a villain is no disseisor, *Fitz. ass.* 82. If tenant by *elegit* make

Infant or feme covert shall not be disseisors.

a feoffment, they are both disseisors, *Br. Tit. Assis.* 19. If one levy rent upon my tenant by coertion, he only is the disseisor; but if the tenant pay it upon a voluntary agreement, they are both disseisors, 16 *ass.* 15 *Fitz. ass.* 439. If my tenant attorn to a stranger, they are both disseisors, *Fitz. ass.* 470.
(287) Denyer, none ready upon the land upon demand, or to manure the land, or inclosure, is a disseisin of a rent seek, *Lit. Sect.* 233. 237. 36 *ass.* 7. 49 *ass.* 56 rescous, replevin and inclosure of rent-service rescouse, replevin, inclosure and denyer, and menaces by the tenant are disseisins *per lit. Sect.* 238. 9 *ass.* 7. 14. *E.* 4 4 *Lit. Sect.* 240.

Mortmain. If a corporation be plaintiff in an assise, it shall be inquired whether it be not by collusion to mortmize the land, otherwise it is error, *Rast. Entr. Ass.* in *corps* politic, 1, 2, 3.

Damages where to be inquired only. In all cases where the seisin and disseisin is not to be inquired, the assise shall be awarded in right of damages, 17 *Ass.* 2. And therefore if a record be pleaded and fail, damages only shall be inquired, 15 *Ass.* 16.

Other matters concerning damages. In certificate of assise the tenant shall recover double damages, *per W.* 2, *c.* 25. If the tenant fail of the record, the plaintiff shall recover double damages, *W.* 2, *c.* 25. Double damages given in a special assise upon a forcible entry *per stat.* 4 *H.* 4, *c.* 8. The plaintiff shall recover treble damages against him who enters by patent of the king if he hath no right to grant; *per* 1 *H.* 4, *c.* 8.

Treble damages. Treble damages in assise of common of pasture *per stat.* of *W.* and *Merton*, of approvement by 3 and 4 *E.* 6, *c.* 3. Treble damages is given against a disseisor with force by 8 *H.* 6, *c.* 9. If the sheriff, escheator or other officer of the king by colour

of their office disseise any, he shall recover double damages, *W.* 1, *c.* 24. And if a disseisor alien to defraud the plaintiff of his action, he may within the year bring his action against him and recover double damages *per* 1 *R.* 2, *c.* 9. And if the tenant plead joint-tenancy by deed, which is found against him, the plaintiff shall have double damages by the statute of *conjunctim feoffatis*, 24 *E.* 3.

Against whom damages are to be given. At common law per fiat:

At common law no damages were to be recovered but only against the disseisor; but by the statute of *Glocester*, *c.* 1, it is given against the tenants, *et quod quisque responderet pur son tenps, &c.* but then the plaintiff ought to aver the insufficiency of the disseisor and pray that it may be inquired, and who hath taken the profits, and then every one for his time who is party to the writ shall be charged; but *quere* if the sheriff return the disseisor insufficient, *si executione ne serra agard* against the tenant. It seems it shall, see 31 *Ass.* 5. 40 *E.* 3, 44. 40 *Ass.* 3. 22 *Ass.* 28. 35 *Ass.* 5. And it seems this statute extends to all the cases aforesaid where double or treble damages are given, 2 *Inst.* 285. If a reversioner bring an assise upon the entering upon his tenant who is a termor, he shall recover no damages; and damages may be recovered because of the improvement, 14 *ass.* 13. And damages shall be recovered hanging the assise after verdict and before judgment, 31 *ass* 31, after an adjournment and before judgment, 31 *ass. Fitz. Abbe*, 17. In an assise of rent the plaintiff shall recover the arrears and damages against the tenant who had been but tenant for a month, 33 *H.* 6, 46. Successor shall recover damages and arrears in the time of the predecessor, *Fitz. Abbe*, 17. And where double or treble damages are recovered, they shall be doubled or trebled by the court, *Br. ass.* 478.

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Approvement. If the tenant in assise of common, plead approvement upon the statute, sufficient or not sufficient shall be inquired *per l'assise*, *Fitz. ass.* 137. 7 *E.* 3, 67.

Force. And it is to be inquired by the assise *ex officio*, whether the defendant entered with force, otherwise it is error, although it be not in issue, 2 *H.* 6. 40 *Br ass* 67. If it be found with force, the damages shall be trebled by the court, *Br. ass.* 478.

Non-suit. The plaintiff may be non-suited after verdict upon any other day of the adjournment, if he made default, 47 *ass.* 1.

Verdict. If the defendants are found guilty in any part of the tenements put in view, it is sufficient, 12 *ass.* 4. The recognitors may give a verdict at large in all cases, though upon a special issue, *Co. lib.* 9, 12, *b. Pl.* 93. A deed by which the plaintiff makes his title may be found without pleading, 18 *ass.* 3. The jury may find a condition made at the livery, but not a defeasance after, or a release or a feoffment with warranty, for things only shall be found which cannot be pleaded, *Fitz. ass* 359. 7 *H.* 5. but they cannot find matter of record, 26 *ass.* 2. If the plaintiff makes his title in his plaint, another title may be found, viz. a verdict upon six several special issues, *R. Entr. ass.* in *bar*, 3.

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Re-pleader. If a foreign issue be adjourned in B. repleader shall be there, 22 *H.* 6, 18. If the plaintiff make a good title, and the tenant misrejoin, no re-pleader shall be, but the assise go upon the title, 5 *H.* 7, 29. But if they be at issue upon an insufficient bar, there shall be a repleader, 22 *H.* 6, 19. But by this book it seems they shall replead as in other actions.

By the statute of *W.* 2, *c.* 25, a certificate of assise is given, and this is where the tenant hath pleaded by baily to the assise, or the assise is taken by default, where he hath matter of reccord, or a release, or other matter in writing which may discharge him, then he may come before or after judgment and pray that it may be inquired, or have a certificate that it was not well examined, and upon this the jury shall appear again and be sworn to try this matter, and it shall be sued before the same justices, or others in B. or B. R. If it happen to sit in the same county: And it seems the justices before whom the assise was taken may upon such matter make a certificate and warn the party and jury without any new commission, and restore the possession, and double damages: If the tenant hath matter of record, then a *scire faicas* shall issue against the party, and restitution and double damages against the plaintiff, and he shall be imprisoned. But if the certificate be had before other justices, then there ought to be a new commission; and although some of the jurors be dead, yet they may proceed with others if there be two alive of the former, *F. N. B.* 183, *b.* 7 *H.* 4, 45. 12 *H.* 4. And if the record of the assise be removed in B. the certificate may be sued there although that the land be in another county. 33 *H.* 6, 20 21 *ass.* 7. And the process is summons against the jurors, and a *venire* against the parties, and after a *distringas*, &c. and it may be tried by *nisi prius*, *F. N. B.* 183. And it lies upon a defeasance which bears date in a foreign county, and there is to be tried by adjournment in B. 2 *Inst.* 415. And it may be taken by default, and then the assise shall inquire at large of all circumstances, as if it be upon a release of the ancestor with warranty, it shall be inquired whether he be his next heir, whether he were of full age, sound memory, out of prison at the time of the making, if the tenant was seised at the time of the release, or if the plaintiff had any new

Certificate of assise.

Proceſs in Certificate.

Quere Inde 28 E. 3. 21.

title after, 26 *ass.* 5. It lies upon a fine, 32, upon a gift in tail, 13 *ass.* 5.

Abridgement of plaints.

If the plaintiff abridge his plaint at any time before judgment he may, and therefore it is good policy, if the assise find against the party for any part to abride for it, *Kell.* 116. 6 *H.* 7, 78. *Dyer* 88. But by *Br. abridg.* 15, it seems he cannot abridge after verdict, nor can abridge as to the vill after a challenge for the hundred, 28 *Ass.* 38. *contr. tenetur. Br. abridg.* 15. He cannot abridge in a vill in an assise, otherwise in dower, 21 *E.* 4, 24. He may abridge after adjournment, 10 *H.* 6, 22. He cannot abridge part of an entire rent, 65, *b*, nor an entire manor, 4 *E.* 4, 33. 6 *H.* 7, 38. *Kell.* 116, *b.* But in an assise of land and rent he may abridge, 14 *Ass.* 9. So of a messuage and land, *Dyer* 62, *a.* If the plaint be of acres, he may abridge any of them, 4 *E.* 4, 33. *Kell.* 116. But now by the statute of 21 *H.* 8, *c.* 3. If the tenant plead in bar to any part of a manor, as the third, fourth, or fifth part, the plaintiff may in that abridge his plaint, which seems to be against the law before in the 5 *H.* 7, 7.

Judgment in Certificate.

The judgment in certificate of assise is that the tenant shall be restored to the land, and recover double damages, and the plaintiff *Capiatur*, *Fitz. Judgment* 189. If an assise be brought against two, and one plead a record and fail, upon a release of damages the plaintiff shall have judgment, 44 *E.* 3, 23. *Contr.* 44 *Ass.* 32. If the plaintiff makes default after verdict, *quere* whether the judgment shall be upon the verdict or non-suit, 12 *Ass.* 23. 31 *E.* 3, 30, seems on the *non-suit*, 47 *Ass.* 1. If the defendants are found guilty in any part, it is sufficient, and in the entry of the judgment the plaintiff shall not be amerced for the residue, 12 *Ass.* 4. 8 *Ass.* 33. But if any of the tenants be not found guilty, he shall be

Amercement.

amerced as to them, *Rast. Entr. Ass. Barr.* 2, 10. *Office* 1. 31 *Ass.* 31. The judgment in assise of *sovent distress* is, that he shall hold the land without multiplicity of distress, it seems in the case *si quis pascit, &c.* 8 *Co. Webb's case.* If a foreign plea be adjourned in B. and there found against the defendant, the plaintiff may release damages, and have his judgment, *Dyer* 250, *b.* The judgment between a tenant in common and a joint-tenant shallbe, that the plaintiff shall hold one moiety in severalty, 10 *Ass.* 17. 7 *Ass.* 10. *Contr.* 28 *Ass.* 35. Judgment in sovent distress. (291)

The execution is an *habere facias seisinam* and *Elegit, Capias, fieri facias* for costs and damages, but after the commission is determined, the plaintiff may have an action of debt for the damages and costs, or remove the record in B. and thereupon a *capias* for the fine, he may pray the party in execution, 33 *H.* 6. 20. If the tenant hath one acre in *jure suo proprio*, and another in *jure uxoris*, and one is recovered, execution shall be in his own acre, 48 *E.* 3. 31. Or it seems that a *scire facias* for the damages may issue upon the assise removed in *B. R. Rast. Entr. ass.* in *execution.* 3. and *scire facias ibidem.* Execution.

Error lies not in *B.* but in *B. R.* only *Dyer* 250. It is error to inquire of the bar (before the tenancy if there be several tenants, or the plaintiff elect his tenant,) 11 *H.* 4. 68. If it be reversed in *B. R.* it may proceed there *de novo* to issue. 31 *ass.* 18. Error.

If the tenant plead a false plea, he shall be imprisoned, 6 *ass.* 4. If he plead joint-tenancy by deed and it be found against him, he shall be imprisoned. *Vide plus.* 31 *ass.* 11. Imprisonment.

Attorney. The plaintiff or defendant may make an attorney *per* 13 *E.* 3. *c.* 1. *Stat.* of *York* If the defendant make many attorneys and they differ in pleading, and one plead to the assise and the other in bar, the plea to the assise only shall be entered; but if for an infant, the most beneficial, *Fitz. ass.* 120. Warrant of attorney entered upon the roll. *P.* 17 *H.* 7. *Rot* 402. *Rast. Entr ass. Corps politic,* 8. Assise in special warrant of attorney, and the husband an attorney for the wife.

Parcels. Regularly an assise shall not be taken by parcels, and therefore if one plead as tenant to parcel, and another as joint-tenant by deed which is adjourned, *idem dies* shall be given to the first, because it shall not be taken by parcels, 19 *E.* 2. *Fitz. ass.* 407. (292) and yet 35 *ass.* 2, & 3. the tenancy was first inquired, and then adjourned, and upon remand was taken at large, 16 *ass.* 25. it was there taken by parcels.

Joinder in action. If there be three coparceners and one distrain, the other shall have an assise by themselves only, 12 *ass.* 12. If the tenant plead several bars, they may reply jointly and plead to the several bars, *Kell.* 117. *a.* And one may join several disseisors and tenants in one assise, for several disseisins, at several days in several places, *Pl.* 91.

Several Entries used in an assise of Novel disseisin, viz.

And the said A B & C by V their attorney come and the said A says that he hath not done, the injury or disseisin aforesaid &c. of the tenements aforesaid, with the appurtenances. And of this he puts himself upon the assise. And the said E doth the like &c. Let the assise be taken between them &c. And the said B answers as tenant of the free-

hold of the tenements aforesaid with the appurtenances in view of the recognitors of the assise aforesaid placed, and in the said plaint specified, and says that the assise between him the said B and the said E in this behalf ought not to be made, because he says that one I S was seised of the tenements aforesaid with the appurtenances in view &c in his demesne as of fee. And being so seised of the same tenements with the appurtenances, enfeoffed I N to have to him and his heirs forever, by virtue of which said feoffment the same I N was thereof seised in his demesne as of fee, which said estate in the said tenements with the appurtenances, the same B now has, and the said E claims the tenements aforesaid with the appurtenances by colour of a certain deed of lease to him thereof made for term of his life by the said I S and entered on the same tenements when nothing of the tenements aforesaid with the appurtenances ever passed into the possession of said E by that deed upon which possession thereof of the said E one I G entered into the tenements aforesaid with the appurtenances and the said E therefrom expelled and removed, upon which possession of the said I G thereof the said B re-entered as he lawfully might. And this he is ready to verify. Wherefore he prays judgment if the assise thereof between him and the said E in this behalf ought to be made.

The form of pleading where there are 3 tenants and one pleads as a different, another as tenant 3d. as tenant sans ceo que l'autre rien ad. Pleading dun feoffment. IS.

Colour.

And the said C says that he is sole tenant of the freehold of the tenements aforesaid in view of the recognitors of the assise placed and in the said plaint specified with the appurtenances without this that the said B had any thing either on the day of purchasing the original writ aforesaid or ever afterwards had any thing in the same, and he says the assise ought not *to proceed* because he says that the said E was not seised of the tene-

Tenant without this that the other hath any thing.

(293)

ments aforesaid with the appurtenances within the said 30 years as of such an estate from which he might be disseised & this &c.

"And the said E says, that the said B is, and at the time of purchasing the original writ of assise aforesaid, was tenant of the free hold of the said tenements with the appurtenances, without this, that the said C had any thing in the same. And as to the said plea by the said C above in bar pleaded, the same E says that the plea aforesaid is not sufficient in the law to preclude the said E from his said assise against him, and that he to the said plea in manner and form above pleaded, hath no necessity, nor is he anywise bound by the law of the land to answer; and this he is ready to verify: Wherefore he prays judgment, and that he may proceed to take the assise aforesaid thereof between him the said E and the said C.

Title at large. "And the said E as to the said plea of the said B above in bar of the assise pleaded, the same E says that he by any thing in the said plea alledged ought not to be precluded from having his assise aforesaid against the said B, because he says that one G S was seised of the tenements aforesaid *with* the appurtenances in his demesne as of fee, and being so thereof seised, died thereof seised; after whose death the tenements aforesaid with the appurtenances descended to one T S as son and heir of said I, by virtue whereof the said T entered into the tenements aforesaid with the appurtenances, and was thereof seised in his demesne as of fee, and being so thereof seised the same T enfeoffed the said E to have to him and his heirs, whereby the said E was thereof seised in his demesne as of fee, until the said A, B and C unjustly, &c disseised him the said E as the said E above against him complains, and this he is ready to verify; wherefore he

prays judgment, and that the assise between him the said E and the said B may be taken.

" And the said B prays, that upon the said title of the said E the assise may come and the said E likewise, &c. Therefore upon that title let the assise be taken between them, &c. And the recognitors being called, come not; and hereupon the said assise remains to be taken until such a day next ensuing, by default of recognitors, &c. Therefore let the sheriff then have the bodies, &c. and in the mean time, &c. the same day is given to the said A, B and C here, &c. at which day come here the parties aforesaid by their attornies, and none of the recognitors of the assise aforesaid come, hereupon the said assise is further continued here until, &c. next ensuing &c. and let the sheriff distrain the recognitors of the said assise, &c. and in the mean time, &c. the same day is given to the parties aforesaid here, &c. at which day the said assise remains without day, inasmuch as Richard now king, the third after the conquest, as true and undoubted king of the same kingdom by right divine and human, hath actually taken upon him the government and royal dignity of this kingdom, Edward the fifth the late king being therefrom lawfully removed. And afterwards, to wit, on such a day, &c. the said E comes here into court by his attorney aforesaid, and prays the writ of the lord the now king to the sheriff of N, to be directed to re-summon the recognitors of the said assise that they be here to make recognition of the said assise, &c. and also to re-attach the said A, B and C, or their bailiff or bailiffs if they are not found, that they be here then to hear that recognition, and to be returned here, &c. and in the mean time, &c. the same day, &c. at which day, &c. and the recognitors of the said assise being re-summoned, &c. none of them came, whereupon the said assise is continued here until such a day &c. therefore let the

Let the assise come upon the title.

Remains by default of recognitors.

Habeas corpora.

(294)

Distringas recog.

Discontinuance by demise of the king.

Re-summons and attachment

Remains by default.

Hab. corp. sheriff then have here the bodies of the recognitors, &c. and in the mean time, &c. the same day, &c. at which day &c. & the recognitors being exacted come, but because the recognitors aforesaid have not had view of the tenements aforesaid, therefore the assise remains to be taken until such a day, &c. and let the sheriff distrain, &c. the same day is given, &c. and let the said recognitors in the mean time make view of the tenements aforesaid, to wit, on such a day, &c. to wit, each of them under the penalty of ten shillings, at which day comes here as well, &c. and the recognitors being called also come, who to speak the truth in the premises being elected, tried and sworn, say upon their oath, that the said E was seised of the tenements aforesaid in their view placed and in the complaint aforesaid specified with the appurtenances in his demesne as of fee, &c. until the said A, B and C thereof unjustly and without judgment and with force and arms within thirty years next, &c. disseised him, to the damage of the said E by reason of said disseisin beyond his costs and charges by him about his suit in this behalf expended, to 5*l.* and for those costs and charges 40 shillings; and hereupon the said recognitors inquire what right the said E has in the said tenements, and what ancestor of his was in seisin thereof as in his proper right (being in case of a bishop) and if any fraud or collusion was had between the said parties against the form of the statute whereby it is provided that no lands or tenements may come into mortmaine by any manner aforesaid, and how much the tenements aforesaid with the appurtenances were worth per annum according to their true value; they say that the said bishop and all his predecessors, bishops of the cathedral church aforesaid, were seised of the tenements aforesaid with the appurtenances in their demesne as of fee and in right of the church aforesaid from time whereof, &c. until the said A, B and C,

Remains by default of view

View under penalty.

Verdict,

By force.

What right.

Collusion.

him the now bishop thereof unjustly and without judgment and with force and arms disseised—and that one R, formerly bishop of the said church, was seised in right of the said church of the tenement aforesaid with the appurtenances in the time of Edward, late king of England, &c. and that no fraud or collusion has been had between the parties aforesaid against the form of the statute aforesaid before mentioned, and that the tenements aforesaid with the appurtenances are worth per annum in all the issues beyond reprises according to their true value 3*l*. Therefore it is considered that the said bishop recover his seisin of the tenements aforesaid with the appurtenances in the plaint aforesaid specified, according to the view of the recognitors of the same assise, and treble his damages aforesaid according to the form of the statute in this case provided, by the recognitors aforesaid, in form aforesaid assessed, which treble damages amount to, &c. and the said A, B and C in mercy, &c." Judgment.

Note, this is not an intire record, but several, to shew the several forms as you may discern, because the verdict does not agree with the title.

Note, if the tenant in assise plead joint-tenancy by deed, a *scire facias* shall be awarded against the other joint-tenant, and the assise shall be adjourned, and the other joint-tenant shall be made party by the statute of *conjunctim feoffatis*, but if he plead it by will without deed, it shall be tried by the assise immediately, 27 *Ass* 10. or 20. *Vide* 22 *Ass.* 1. that he shall not have the plea of joint-tenancy generally. Joint-tenancy pleaded.

FINIS.

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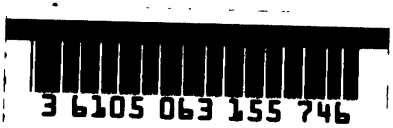
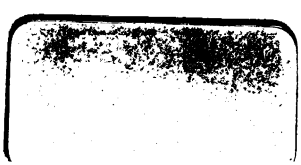
ERRATA.

IN page 105, in the note, for " appears" read appear.
144, third line, for " ſon" read form.
169, in the note, for " *ad hoc*" read *adhuc*.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